

HAYEK AND THE CITATION OF FOREIGN LAW: A RESPONSE TO PROFESSOR JEREMY WALDRON

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ABSTRACT

This Article expands on Professor Jeremy Waldron's recent work arguing that U.S. courts ought to cite foreign law in deciding U.S. cases. The authors make a Hayekian argument in favor of the citation of foreign law, but they note that there are powerful countervailing ideas in consent theory and for economics of federalism reasons. The Article concludes that foreign law should be cited where it is informative but denies that foreign law is in any way binding on U.S. courts.

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INTRODUCTION

Of the just in the political sense, one part is natural, the other, conventional. The natural [part of political justice] is that which has the same capacity everywhere and is not dependent on being held to exist or not, whereas the conventional part is that which at the beginning makes no difference whether it is thus or otherwise, but once people have set it down, it does make a difference

In the opinion of some people, all [just things] are of this character, because what is by nature is unchangeable and has the same capacity everywhere, just as fire burns both here and in Persia, whereas they see the just things being changed. But this is not the way it is

. . . [T]he just things that are not natural but human are not everywhere the same, since the regimes are not either; but everywhere there is only one regime that is in accord with nature, the best regime.

Aristotle¹

In 2005, the Supreme Court declared unconstitutional capital punishment for offenses committed by a person under the age of eighteen.² *Roper v. Simmons* concerned a Missouri resident named Christopher Simmons, who at age seventeen burgled his neighbor Shirley Cook, tied her up, kidnapped her, and threw her over a bridge.³ The evidence was overwhelmingly against Simmons, and he was sentenced to death.⁴ At the time of sentencing, Simmons was over the age of eighteen.⁵ He appealed, arguing that the U.S. Constitution forbade execution of offenders younger than eighteen.⁶

In a 5–4 decision, the Supreme Court agreed, ruling that the juvenile death penalty violated the Eighth Amendment’s prohibition of “cruel and unusual punishment[.]”⁷ Writing for the majority, Justice Anthony Kennedy asserted that the question of whether the Eighth Amendment prohibited the imposition of capital punishment for juvenile offenders required the Court to interpret the Constitution “according to its text, by considering history, tradition, and precedent, and with due regard for its purpose and function in the

1. ARISTOTLE, ARISTOTLE’S NICOMACHEAN ETHICS bk. V, at 104-05 (Robert C. Bartlett & Susan D. Collins trans., Univ. of Chi. Press 2011) (c. 384 B.C.E.) (first and third alteration in original).

2. *Roper v. Simmons*, 543 U.S. 551, 560 (2005).

3. *Id.* at 556-57.

4. *Id.* at 557-58.

5. *Id.* at 556 (“About nine months later, after he had turned 18, he was tried and sentenced to death.”).

6. *Id.* at 559.

7. *Id.* at 554, 568; U.S. CONST. amend. VIII.

constitutional design,”⁸ and also with regard to “the evolving standards of decency that mark the progress of a maturing society,”⁹ a concept first articulated by the Supreme Court in *Trop v. Dulles*.¹⁰

Far from coming as a total surprise, the ruling followed a line of precedent developed by the Court over the prior seventeen years.¹¹ The 1988 decision in *Thompson v. Oklahoma*, which forbade the execution of offenders under the age of sixteen when they committed a capital crime,¹² referred to foreign law.¹³ In 2002, the Court cited “evolving standards of decency” and foreign law in *Atkins v. Virginia* in prohibiting capital punishment for the individual with an intellectual disability.¹⁴

Nonetheless, one line of reasoning Justice Kennedy pursued in his opinion in *Roper v. Simmons* wound up engendering particular controversy.¹⁵ At one point, Justice Kennedy wrote, “[T]he stark reality [is] that the United States is the only country in the world that continues to give official sanction to the juvenile death penalty.”¹⁶ In fact, “only seven countries other than the United States have executed juvenile offenders since 1990: Iran, Pakistan, Saudi Arabia, Yemen, Nigeria, the Democratic Republic of Congo, and China. Since then each of these countries has either abolished capital punishment for juveniles or made public disavowal of the practice.”¹⁷

These words were met with fierce antipathy in some quarters.¹⁸ In his dissent, Justice Antonin Scalia wrote, “[T]he basic premise of

8. *Roper*, 543 U.S. at 560.

9. *Id.* at 561 (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958)).

10. 356 U.S. at 101.

11. See generally *Thompson v. Oklahoma*, 487 U.S. 815 (1988); *Stanford v. Kentucky*, 492 U.S. 361 (1989); *Penry v. Lynaugh*, 492 U.S. 302 (1989); *Atkins v. Virginia*, 536 U.S. 304 (2002).

12. 487 U.S. at 838.

13. *Id.* at 830-31.

14. 536 U.S. at 312 (quoting *Trop*, 356 U.S. at 101); *id.* at 316 n.21 (“Moreover, within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved.” (citing the European Union’s amicus brief)); *id.* at 321.

15. See, e.g., 543 U.S. 551, 607-08, 622-28 (2005) (Scalia, J., dissenting); see also MARK C. MILLER, THE VIEW OF THE COURTS FROM THE HILL: INTERACTIONS BETWEEN CONGRESS AND THE FEDERAL JUDICIARY 181 (2009); Jason DeParle, *In Battle to Pick Next Justice, Right Says, Avoid a Kennedy*, N.Y. TIMES, June 27, 2005, at A1; JEFFREY TOOBIN, THE NINE: INSIDE THE SECRET WORLD OF THE SUPREME COURT 196-99 (2007).

16. *Roper*, 543 U.S. at 575.

17. *Id.* at 577.

18. See sources cited *supra* note 15.

the Court's argument—that American law should conform to the laws of the rest of the world—ought to be rejected out of hand. . . . In many significant respects the laws of most other countries differ from our law”¹⁹ In the wake of *Roper*, as well as other opinions citing foreign law, talk of impeachment circulated, and death threats were even made against the Justices.²⁰ Legislation was introduced in Congress that would have forbade reliance on foreign law by federal courts.²¹

Roper v. Simmons was hardly the first Supreme Court decision to cite foreign law.²² Indeed, the Supreme Court has relied on foreign law since the days of Chief Justice John Marshall,²³ but it was not until the 1940s that “the Supreme Court . . . greatly accelerated the number of references it has made to foreign law in constitutional cases” and relied on foreign law in holding statutes unconstitutional.²⁴ Seven majority opinions and one dissent used

19. *Roper*, 543 U.S. at 624 (Scalia, J., dissenting).

20. See, e.g., Justice Ruth Bader Ginsburg, Address Before the Constitutional Court of South Africa: “A Decent Respect to the Opinions of [Human]kind”: The Value of a Comparative Perspective in Constitutional Adjudication (Feb. 7, 2006), available at http://www.supremecourt.gov/publicinfo/speeches/viewspeeches.aspx?Filename=sp_02-07b-06.html; see also Ginsburg, *O'Connor Targets of Death Threat*, NAT'L L.J., Mar. 20, 2006, at 3; Tony Mauro, *Ginsburg Discloses Threats on Her Life: In Speeches, Justice Says She and Sandra Day O'Connor Were Targeted Because of Use of Foreign Law in Cases*, NAT'L L.J., Mar. 15, 2006, at 8; Gene C. Gerard, *Conservatives, Judicial Impeachment, and Supreme Court Justice William O. Douglas*, DISSIDENT VOICE (May 7, 2005), <http://www.dissentvoice.org/May05/Gerard0507.htm> (“Some of the strongest calls by conservatives for impeachment have been heaped on U.S. Supreme Court Justice Anthony Kennedy. . . . [E]arlier this year, he joined the court majority in ruling that it was unlawful to administer the death penalty to those under eighteen years of age.”); Carl Hulse, *Republicans May Hasten Showdown on Judicial-Nomination Filibusters*, N.Y. TIMES (Apr. 13, 2005), <http://www.nytimes.com/2005/04/13/politics/13judges.html> (“As the author of the decision on executions in juvenile crime . . . Justice Kennedy has been a target of sustained attack, with some conservatives calling for his impeachment.”); Dana Milbank, *And the Verdict on Justice Kennedy Is: Guilty*, WASH. POST (Apr. 9, 2005), <http://www.washingtonpost.com/wp-dyn/articles/A38308-2005Apr8.html> (“[The] chairman of the Home School Legal Defense Association[] said Kennedy ‘should be the poster boy for impeachment’ for citing international norms in his opinions.” (quoting Michael P. Farris, Chairman of the Home School Legal Defense Association)).

21. H.R. 3799, 108th Cong. §§ 201, 301-302 (2004); S. 520, 109th Cong. §§ 101, 301-302 (2005).

22. See generally Calabresi & Zimdahl, *supra* note *.

23. *Id.* at 763.

24. *Id.* at 838.

foreign law between 1804 and 1840: *Murray v. Schooner Charming Betsy*,²⁵ *Rose v. Himely*,²⁶ *Brown v. United States*,²⁷ *The Antelope*,²⁸ *United States v. Smith*,²⁹ *Columbian Insurance Co. of Alexandria v. Ashby*,³⁰ *The Rapid*,³¹ and Justice Joseph Story's dissent in *Brown v. United States*.³² Between 1840 and 1890, at least four majority opinions relied on foreign law: *Dred Scott v. Sandford*,³³ *Reynolds v. United States*,³⁴ *Hurtado v. California*,³⁵ and two of the three *Legal Tender Cases*.³⁶ The dissenters in *Dred Scott* also relied on foreign law.³⁷ Between 1890 and 1940, at least seven Supreme Court opinions cited foreign law: *Block v. Hirsh*,³⁸ the *Selective Draft*

25. 6 U.S. (2 Cranch) 64, 118 (1804) (stating that an Act of Congress should not be construed to violate the laws of nations "if any other possible construction remains").

26. 8 U.S. (4 Cranch) 241, 270-72 (1808) (analyzing British precedent on jurisdiction in foreign nations), *overruled in part by* *Hudson v. Guestier*, 10 U.S. (6 Cranch) 281 (1810).

27. 12 U.S. (8 Cranch) 110, 124-25 (1814) (detailing views of famous foreign jurists on war powers).

28. 23 U.S. (10 Wheat.) 66, 114-16 (1825) (analyzing international consensus for the slave trade).

29. 18 U.S. (5 Wheat.) 153, 160-62 (1820) (citing various European legal sources and commentaries in discussing what constitutes a violation of the laws of nations); *id.* at 168-80 (Livingston, J., dissenting).

30. 38 U.S. (13 Pet.) 331, 337-38 (1839) (looking to European maritime law and Roman jurisprudence concerning general averages).

31. 12 U.S. (8 Cranch) 155, 162 (1814) (considering the law of nations and the laws of England before the American Revolution).

32. 12 U.S. (8 Cranch) at 131-35 (Story, J., dissenting) (detailing the work of famous foreign jurists, but reaching a very different interpretation than the majority in that case).

33. 60 U.S. (19 How.) 393, 426, 461-62, 467-68, 475-80, 486, 495-97, 500, 534-35, 591-92, 595 (1856) (referencing foreign law in six opinions in the decision, four concurring and two dissenting), *superseded by constitutional amendment*, U.S. CONST. amend. XIV; *see also* Calabresi & Zimdahl, *supra* note *, at 794-802.

34. 98 U.S. 145, 158-59 (1878) (contrasting the development of British and U.S. case law regarding testimony of absent witnesses).

35. 110 U.S. 516, 521-26 (1884) (interpreting due process in light of the language and interpretation given to parts of the *Magna Carta*).

36. *Juilliard v. Greenman*, 110 U.S. 421, 447 (1884) (pointing to the European belief that the sovereign can issue paper currency for private debts); *Knox v. Lee*, 79 U.S. (12 Wall.) 457, 568-69 (1870) (Bradley, J., concurring) (arguing that European nations, notably England and France, authorized the use of paper currency to pay wartime debt).

37. 60 U.S. (19 How.) at 534-35 (McLean, J., dissenting); *id.* at 591-92, 595, 602 (Curtis, J., dissenting).

38. 256 U.S. 135, 155 (1921) (upholding the constitutionality of rent control statutes and stating that the "question is whether Congress was incompetent

Cases,³⁹ *O'Malley v. Woodrough*,⁴⁰ *United States v. Perkins*,⁴¹ *Palko v. Connecticut*,⁴² *Muller v. Oregon*,⁴³ and *The Paquete Habana*.⁴⁴

And since 1940, at least seventeen Supreme Court decisions have cited, considered, or relied on foreign law.⁴⁵ They include *Trop v. Dulles*,⁴⁶ *Miranda v. Arizona*,⁴⁷ *Coker v. Georgia*,⁴⁸ *Enmund v. Florida*,⁴⁹ *Thompson*,⁵⁰ *Atkins*,⁵¹ and *Roper*.⁵² Other post-1940 Supreme Court decisions that rely on or cite foreign law are *Roe v. Wade*,⁵³ *Washington v. Glucksberg*,⁵⁴ *Lawrence v. Texas*,⁵⁵ and

to meet it in the way in which it has been met by most of the civilized countries of the world").

39. 245 U.S. 366, 378-79 (1918) (surveying the list of countries requiring military service in times of need and specifically discussing such rules in England).

40. 307 U.S. 277, 281 n.8 (1939) (noting a decision by the Supreme Court of South Africa interpreting language taken from a clause of Article III, § 1 of the U.S. Constitution).

41. 163 U.S. 625, 627 (1896) (discussing British taxation statutes during the reigns of Henry II and Henry VIII).

42. 302 U.S. 319, 326 n.3 (1937) (noting that there is no immunity from compulsory self-incrimination in many Continental European countries).

43. 208 U.S. 412, 419 n.1 (1908) (noting foreign statutes regarding gender-based worker regulation).

44. 175 U.S. 677, 700 (1900) ("International law is part of our law . . .").

45. See *infra* notes 46-62.

46. 356 U.S. 86, 102-03 (1958) (plurality opinion) (examining U.N. surveys detailing which countries impose expatriation as a punishment and concluding that expatriation is unconstitutional under the Eighth Amendment).

47. 384 U.S. 436, 486-90 (1966) (pointing to English, Scottish, and Indian law enforcement policies to show that warning the accused of his custodial rights does not seriously hamper effective law enforcement).

48. 433 U.S. 584, 596 n.10 (1977) (plurality opinion) (noting international consensus against the use of the death penalty for rape).

49. 458 U.S. 782, 796 n.22 (1982) (noting foreign views regarding the death penalty in felony murder cases).

50. *Thompson v. Oklahoma*, 487 U.S. 815, 830 (1988) (plurality opinion) ("The conclusion that it would offend civilized standards of decency to execute a person who was less than 16 years old at the time of his or her offense is consistent with the views . . . expressed by . . . other nations that share our Anglo-American heritage, and by the leading members of the Western European community.").

51. *Atkins v. Virginia*, 536 U.S. 304, 316 n.21 (2002) ("[W]ithin the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved.").

52. *Roper v. Simmons*, 543 U.S. 551, 575-77 (2005).

53. 410 U.S. 113, 136-38 (1973) (referring to English legislative and judicial developments to help support the proposition that statutory criminalization of abortion was largely a nineteenth- and twentieth-century phenomenon).

54. 521 U.S. 702, 718 n.16 (1997) (noting actions by courts and legislatures in Canada, England, New Zealand, and Australia during the 1990s to prohibit assisted suicide).

Justice John Marshall Harlan's concurring opinion in *Griswold v. Connecticut*.⁵⁶ Still other cases in this modern time period citing foreign law include *Rochin v. California*,⁵⁷ *Smith v. California*,⁵⁸ *Adamson v. California*,⁵⁹ *Wolf v. Colorado*,⁶⁰ *Printz v. United States*,⁶¹ and *Knight v. Florida*.⁶²

In *Lawrence v. Texas*, the Court struck down a Texas law classifying consensual, adult homosexual intercourse as sodomy.⁶³ That opinion noted that a report prepared for the British Parliament by an advisory committee recommended that laws punishing homosexual conduct be repealed in 1957.⁶⁴ More recently, in 1981, the European Court of Human Rights invalidated a law from Northern Ireland criminalizing consensual homosexual conduct.⁶⁵ Noting that the right being sought by the plaintiff in *Lawrence* "has been accepted as an integral part of human freedom in many other countries," Justice Kennedy wrote that "[t]here ha[d] been no showing that . . . the governmental interest in circumscribing personal choice is somehow more legitimate or urgent" in this country.⁶⁶

55. 539 U.S. 558, 573 (2003) (discussing recent decisions in Europe striking down laws prohibiting homosexual sodomy).

56. 381 U.S. 479, 500 (1965) (Harlan, J., concurring). While he did not directly cite foreign law, Justice Harlan adopted his concurrence in *Griswold* from his dissent in *Poe v. Ullman*, 367 U.S. 497, 541 (1961) (Harlan, J., dissenting), which rooted due process protection in the *Magna Carta*.

57. 342 U.S. 165, 169 (1952) (suggesting that American criminal procedure rules should be rooted in the "notions of justice of English-speaking peoples").

58. 361 U.S. 147, 166 (1959) (Frankfurter, J., concurring) (discussing debates in the House of Commons over obscenity provisions).

59. 332 U.S. 46, 63 (1947) (Frankfurter, J., concurring) (referencing English methods for ascertaining facts during the eighteenth century in passing a method for interpreting the Due Process Clause of the Fourteenth Amendment).

60. 338 U.S. 25, 29 (1949) ("When we find that in fact most of the English-speaking world does not regard as vital to such protection the exclusion of evidence thus [unlawfully] obtained, we must hesitate to treat this remedy as an essential ingredient of the [Fourth Amendment] right.").

61. 521 U.S. 898, 976-77 (1997) (Breyer, J., dissenting) (mentioning European federalism balances).

62. 120 S. Ct. 459, 462 (1999) (Breyer, J., dissenting) (analyzing Jamaican interpretation of British laws addressing the length of time after sentencing within which a prisoner must be executed).

63. 539 U.S. 558, 578-79 (2003).

64. *Id.* at 572-73; THE WOLFENDEN REPORT: REPORT OF THE COMMITTEE ON HOMOSEXUAL OFFENSES AND PROSTITUTION 5-6, 48 (1963).

65. *Dudgeon v. United Kingdom*, 45 Eur. Ct. H.R. 1, 19-20 (1981).

66. *Lawrence*, 539 U.S. at 577.

In *Printz v. United States*, decided in 1997, the Supreme Court invalidated an interim provision of the Brady Handgun Violence Prevention Act that required local law enforcement officers to conduct background checks on potential gun buyers.⁶⁷ In his dissent, Justice Stephen Breyer wrote, “[T]he United States is not the only nation that seeks to reconcile the practical need for a central authority with the democratic virtues of more local control,” citing Switzerland, Germany, and the European Union as examples of other countries facing the same basic problem.⁶⁸ Acknowledging that there may be relevant differences between foreign legal systems and our own, and that American courts are charged only with interpreting the U.S. Constitution, Justice Breyer wrote that another country’s “experience may nonetheless cast an empirical light on the consequences of different solutions to a common legal problem.”⁶⁹ We believe Justice Breyer’s invocation of foreign law here failed to account for crucial differences in the structures of government established by the American and German constitutions. While it is true that in Germany the national legislature can force the German states to execute the law,⁷⁰ German states also wield greater power against the national government by directly electing representatives to the national legislature.⁷¹ We think Justice Breyer’s misunderstanding of the relevance of foreign law here reveals some pitfalls that courts should try to avoid.

Roper was clearly not the first U.S. Supreme Court decision to cite foreign law. Indeed, the question of whether and when it is

67. 521 U.S. 898, 902-04, 935 (1997).

68. *Id.* at 976 (Breyer, J., dissenting) (“At least some other countries, facing the same basic problem, have found that local control is better maintained through application of a principle that is the direct opposite of the principle the majority derives from the silence of our Constitution.”).

69. *Id.* at 977.

70. *Id.* at 976.

71. Steven G. Calabresi, Lawrence, *the Fourteenth Amendment, and the Supreme Court’s Reliance on Foreign Constitutional Law: An Originalist Reappraisal*, 65 OHIO ST. L.J. 1097, 1106 (2004) (“German states have a powerful tool with which to fight back against federal commandeering—a tool which the American states lack. That tool is the fact that in Germany the state legislatures continue to this day to elect the Upper House of the German National Legislature, while in this country the states have lacked that protection since the adoption of the Seventeenth Amendment.”); *see also* Eric A. Posner & Cass R. Sunstein, *The Law of Other States*, 59 STAN. L. REV. 131, 155 (2006) (“[I]n Germany, the states play a far greater role in creating national law than American states do, and this institutional difference may well make German law uninformative on the questions that concern Americans.”).

appropriate for American courts to cite the decisions of foreign courts in their judgments has long produced heated debate in the legal community with many prominent and respected legal scholars on both sides of the argument.⁷² Professor Calabresi has written about this subject in three prior law review articles.⁷³

72. See generally, e.g., Bruce Ackerman, *The Rise of World Constitutionalism*, 83 VA. L. REV. 771 (1997); Roger P. Alford, *Misusing International Sources to Interpret the Constitution*, 98 AM. J. INT'L L. 57 (2004); James Allan & Grant Huscroft, *Constitutional Rights Coming Home to Roost? Rights Internationalism in American Courts*, 43 SAN DIEGO L. REV. 1 (2006); Philip Alston, *A Framework for the Comparative Analysis of Bills of Rights*, in PROMOTING HUMAN RIGHTS THROUGH BILLS OF RIGHTS: COMPARATIVE PERSPECTIVES 1 (Philip Alston ed., 1999); HENRY J. STEINER, PHILIP ALSTON & RYAN GOODMAN INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS 1087 (3d ed. 2007); Kenneth Anderson, *Foreign Law and the U.S. Constitution*, POL'Y REV., June & July 2005, at 33; William D. Araiza, *Foreign and International Law in Constitutional Gay Rights Litigation: What Claims, What Use, and Whose Law?*, 32 WM. MITCHELL L. REV. 455 (2006); Aharon Barak, *Comparison in Public Law*, in JUDICIAL RECOURSE TO FOREIGN LAW: A NEW SOURCE OF INSPIRATION? 287 (Basil Markesinis & Jörg Fedtke eds., 2006) [hereinafter JUDICIAL RECOURSE]; David J. Bederman, *World Law Transcendent*, 54 EMORY L.J. 53 (2005); Anke Iman Bouzenita, *The Siyar—An Islamic Law of Nations?*, 35 ASIAN J. SOC. SCI. 19 (2007); Ronald A. Brand, *Judicial Review and United States Supreme Court Citations to Foreign and International Law*, 45 DUQ. L. REV. 423 (2007); Paolo G. Carozza, *"My Friend Is a Stranger": The Death Penalty and the Global Ius Commune of Human Rights*, 81 TEX. L. REV. 1031 (2003); Anupam Chander, *Globalization and Distrust*, 114 YALE L.J. 1193 (2005); Sarah H. Cleveland, *Foreign Authority, American Exceptionalism, and the Dred Scott Case*, 82 CHI-KENT L. REV. 393 (2007); Harlan Grant Cohen, *Supremacy and Diplomacy: The International Law of the U.S. Supreme Court*, 24 BERKELEY J. INT'L L. 273 (2006); Ian Cram, *Resort to Foreign Constitutional Norms in Domestic Human Rights Jurisprudence with Reference to Terrorism Cases*, 68 CAMBRIDGE L.J. 118 (2009); Robert J. Delahunty & John Yoo, *Against Foreign Law*, 29 HARV. J.L. & PUB. POL'Y 291 (2005); Graeme B. Dinwoodie, *A New Copyright Order: Why National Courts Should Create Global Norms*, 149 U. PA. L. REV. 469 (2000); Rosalind Dixon, *A Democratic Theory of Constitutional Comparison*, 56 AM. J. COMP. L. 947 (2008); Frank H. Easterbrook, *Foreign Sources and the American Constitution*, 30 HARV. J.L. & PUB. POL'Y 223 (2006); Eric Engle, *European Law in American Courts: Foreign Law as Evidence of Domestic Law*, 33 OHIO N.U. L. REV. 99 (2007); RAFAEL DOMINGO, *THE NEW GLOBAL LAW* (2010); Daniel A. Farber, *The Supreme Court, the Law of Nations, and Citations of Foreign Law: The Lessons of History*, 95 CALIF. L. REV. 1335 (2007); David Fontana, *Refined Comparativism in Constitutional Law*, 49 UCLA L. REV. 539 (2001); Ruth Bader Ginsburg, *Looking Beyond Our Borders: The Value of a Comparative Perspective in Constitutional Adjudication*, 40 IDAHO L. REV. 1 (2003); Ruth Bader Ginsburg, *"A Decent Respect to the Opinions of [Human]kind": The Value of a Comparative Perspective in Constitutional Adjudication*, 1 FIU L. REV. 27 (2006); Rex D. Glensy, *Which Countries Count?: Lawrence v. Texas and the Selection of Foreign Persuasive Authority*, 45 VA. J. INT'L L. 357 (2005); David C. Gray, *Why Justice Scalia Should*

Be a Constitutional Comparativist . . . Sometimes, 59 STAN. L. REV. 1249 (2007); Sarah K. Harding, *Comparative Reasoning and Judicial Review*, 28 YALE J. INT'L L. 409 (2003); Louis Henkin, *That "S" Word: Sovereignty, and Globalization, and Human Rights, Et Cetera*, 68 FORDHAM L. REV. 1 (1999); Vicki C. Jackson, *Constitutional Comparisons: Convergence, Resistance, Engagement*, 119 HARV. L. REV. 109 (2005); Michael Kirby, *International Law—The Impact on National Constitutions*, 21 AM. U. INT'L L. REV. 327 (2006); Harold Hongju Koh, *How Is International Human Rights Law Enforced?*, 74 IND. L.J. 1397 (1999); Harold Hongju Koh, *International Law as Part of Our Law*, 98 AM. J. INT'L L. 43 (2004); Harold Hongju Koh, *The Globalization of Freedom*, 26 YALE J. INT'L L. 305 (2001); Harold Hongju Koh, *Paying "Decent Respect" to World Opinion on the Death Penalty*, 35 U.C. DAVIS L. REV. 1085 (2002); Eugene Kontorovich, *Disrespecting the "Opinions of Mankind": International Law in Constitutional Interpretation*, 8 GREEN BAG 2D 261 (2005); Jack Tsen-Ta Lee, *Interpreting Bills of Rights: The Value of a Comparative Approach*, 5 INT'L J. CONST. L. 122 (2007); Youngjae Lee, *International Consensus as Persuasive Authority in the Eighth Amendment*, 156 U. PA. L. REV. 63 (2007); Sanford Levinson, *Looking Abroad When Interpreting the U.S. Constitution: Some Reflections*, 39 TEX. INT'L L.J. 353 (2004); Basil Markesinis, *Understanding American Law by Looking at It Through Foreign Eyes: Towards a Wider Theory for the Study and Use of Foreign Law*, 81 TUL. L. REV. 123 (2006); Basil Markesinis, *National Self-Sufficiency or Intellectual Arrogance? The Current Attitude of American Courts Towards Foreign Law*, 65 CAMBRIDGE L.J. 301 (2006); JUDICIAL RECOURSE, *supra*; Christopher McCrudden, *A Common Law of Human Rights?: Transnational Judicial Conversations on Constitutional Rights*, 20 OXFORD J. LEGAL STUD. 499 (2000); Christopher McCrudden, *Human Dignity and Judicial Interpretation of Human Rights*, 19 EUR. J. INT'L L. 655 (2008); John O. McGinnis, *Contemporary Foreign and International Law in Constitutional Construction*, 69 ALB. L. REV. 801 (2006); John O. McGinnis & Ilya Somin, *Should International Law Be Part of Our Law?*, 59 STAN. L. REV. 1175 (2007); Vlad F. Perju, *The Puzzling Parameters of the Foreign Law Debate*, 2007 UTAH L. REV. 167; ERIC A. POSNER, *THE PERILS OF GLOBAL LEGALISM* (2009); Philip D. Racusin, Comment, *Looking at the Constitution Through World-Colored Glasses: The Supreme Court's Use of Transnational Law in Constitutional Adjudication*, 28 HOUS. J. INT'L L. 913 (2006); Mark C. Rahdert, *Comparative Constitutional Advocacy*, 56 AM. U. L. REV. 553 (2007); Michael D. Ramsey, *International Materials and Domestic Rights: Reflections on Atkins and Lawrence*, 98 AM. J. INT'L L. 69 (2004); Neomi Rao, *On the Use and Abuse of Dignity in Constitutional Law*, 14 COLUM. J. EUR. L. 201 (2008); Judith Resnik, *Law as Affiliation: "Foreign" Law, Democratic Federalism, and the Sovereignism of the Nation-State*, 6 INT'L J. CONST. L. 33 (2008); Eliezer Rivlin, *Thoughts on Referral to Foreign Law, Global Chain-Novel, and Novelty*, 21 FLA. J. INT'L L. 1 (2009); Ernesto J. Sanchez, *A Case Against Judicial Internationalism*, 38 CONN. L. REV. 185 (2005); Cheryl Saunders, *The Use and Misuse of Comparative Constitutional Law*, 13 IND. J. GLOBAL LEGAL STUD. 37 (2006); Antonin Scalia, *Keynote Address: Foreign Legal Authority in the Federal Courts*, 98 AM. SOC'Y INT'L L. PROC. 305 (2004); David J. Seipp, *Our Law, Their Law, History, and the Citation of Foreign Law*, 86 B.U. L. REV. 1417 (2006); Anne-Marie Slaughter, *A Global Community of Courts*, 44 HARV. INT'L L.J. 191 (2003); Kenneth W. Starr, *The Court of Pragmatism and Internationalization: A Response to Professors Chemerinsky and Amann*, 94 GEO. L.J. 1565 (2006); Nelson Tebbe & Robert L. Tsai, *Constitutional Borrowing*, 108

Most recently Jeremy Waldron, a professor of philosophy at New York University, has criticized the Supreme Court for failing to articulate “a general theory of the citation and authority of foreign law.”⁷⁴ “The justices who cited foreign law,” he says, “simply gave the impression that they thought it was a good idea.”⁷⁵ Obviously, this is not enough. “[H]ow could what the law happened to be in . . . any other country that retains the death penalty, but not for crimes committed in childhood, be relevant to an American decision about what the Eighth Amendment . . . permits a state . . . to do?”⁷⁶ Surely “an international consensus on this issue should give American legislators pause when the question of the juvenile death penalty comes before them.”⁷⁷ Justice Kennedy, however, was speaking “about positive law on both sides of the equation.”⁷⁸ Waldron argues that the use of foreign law in this way “is not a matter of a foreign consensus supporting a normative conclusion as to what American law ought to be, or foreign advocacy adding to the weight of American advocacy concerning law reform in the United States.”⁷⁹ Instead, he says that Justice Kennedy was making a claim “that factual or positive-law propositions about what the law is elsewhere—the ‘stark reality’ of law elsewhere in the world—is capable of supporting, of providing ‘respected and significant

MICH. L. REV. 459 (2010); Genc Trnavci, *The Meaning and Scope of the Law of Nations in the Context of the Alien Tort Claims Act and International Law*, 26 U. PA. J. INT’L ECON. L. 193 (2005); Elizabeth Bulat Turner, Note, *The Relevancy of Foreign Law as Persuasive Authority and Congress’s Response to Its Use: A Preemptive Attack on the Constitution Restoration Act*, 23 GA. ST. U. L. REV. 455 (2006); Mark Tushnet, *The Possibilities of Comparative Constitutional Law*, 108 YALE L.J. 1225 (1999); Mark Tushnet, *When Is Knowing Less Better Than Knowing More? Unpacking the Controversy over Supreme Court Reference to Non-U.S. Law*, 90 MINN. L. REV. 1275 (2006); EMER DE VATTEL, *THE LAW OF NATIONS* (Béla Kapossy & Richard Whatmore eds., Liberty Fund 2008); Ernest A. Young, *Foreign Law and the Denominator Problem*, 119 HARV. L. REV. 148 (2005).

73. See generally Calabresi, *supra* note 71; Calabresi & Zimdahl, *supra* note *; Calabresi, *American Exceptionalism*, *supra* note *.

74. Jeremy Waldron, Professor, NYU Law Sch., Lecture at the Institute for International Law and Justice International Legal Theory Colloquium: “Partly Laws Common to All Mankind”: Foreign Law in American Courts 3 (Jan. 17, 2008), *available* [at](http://ilj.org/courses/documents/2008Colloquium.Session1.Waldron.pdf) <http://ilj.org/courses/documents/2008Colloquium.Session1.Waldron.pdf>.

75. JEREMY WALDRON, “PARTLY LAWS COMMON TO ALL MANKIND”: FOREIGN LAW IN AMERICAN COURTS 22 (2012).

76. *Id.* at 2.

77. *Id.*

78. *Id.*

79. *Id.*

confirmation' for, factual propositions about the law that the U.S. Supreme Court is bound to apply."⁸⁰

Some critics of the Court's approach to using foreign law have accused it of relying on natural law arguments.⁸¹ "Natural law is perhaps the most coherent rationale for recognizing the validity of comparative analysis in constitutional adjudication," asserted Professor Roger Alford.⁸² Judge Richard Posner has likewise claimed of Justice Kennedy's invocation of foreign law:

It marks [him] as a natural lawyer. The basic idea of natural law is that there are universal principles of law that inform—and constrain—positive law. If they are indeed universal, they should be visible in foreign legal systems and so it is "natural" to look to the decisions of foreign courts for evidence of universality.⁸³

Though the Court "does not admit to invoking the idea of natural law," said Eric Engle, "that is what it is [in effect] doing."⁸⁴ He says the Supreme Court is "looking for universal standards to be discovered in the law of foreign nations . . . [and] developing a materialist natural law."⁸⁵ Joan Larsen argues that citing foreign law is akin to "moral fact-finding."⁸⁶

In his book *"Partly Laws Common to All Mankind": Foreign Law in American Courts*, and in a series of law review articles, Professor Waldron attempts to explain the Supreme Court's citation of foreign legal decisions in at least quasi-positive rather than purely natural law terms,⁸⁷ explaining "why American courts are legally

80. *Id.* at 2-3.

81. *See, e.g.*, Roger P. Alford, *In Search of a Theory for Constitutional Comparativism*, 52 UCLA L. REV. 639, 659 (2005); Richard A. Posner, *Foreword: A Political Court*, 119 HARV. L. REV. 31, 85 (2005).

82. Alford, *supra* note 81, at 659.

83. Posner, *supra* note 81, at 85.

84. Engle, *supra* note 72, at 103.

85. *Id.*

86. Joan L. Larsen, *Importing Constitutional Norms from a "Wider Civilization": Lawrence and the Rehnquist Court's Use of Foreign and International Law in Domestic Constitutional Interpretation*, 65 OHIO ST. L.J. 1283, 1293 (2004).

87. *See* Jeremy Waldron, *Foreign Law and the Modern Ius Gentium*, 119 HARV. L. REV. 129, 130, 136 (2005) [hereinafter Waldron, *Foreign Law*] ("Historians of jurisprudence have spent gallons of ink on the question of whether *ius gentium* was conceived as natural law or positive law. The fact is that at various times and for various purposes it has been both, as well as the product of a sort of reflective equilibrium between the two." (citation omitted)); *id.* at 143 (explaining that foreign law "need only be seen as a source of normative insight grounded in the positive law of various countries and relevant to the solution of legal problems in

permitted (or obliged) to cite to non-American sources and how that practice connects with the status of courts as legal institutions.”⁸⁸ Waldron argues that “convergent currents of foreign statutes, foreign constitutional provisions, and foreign precedents sometimes add up to a body of law that has its own claim on us: the law of nations, or *ius gentium*, which applies to us simply as law, not as the law of any particular jurisdiction.”⁸⁹ Waldron characterizes the *ius gentium* as “a body of positive law regulating relations within states particularly between citizen and government but also sometimes between private individuals.”⁹⁰ Waldron is not talking about mere “persuasive authority” either; his is “an argument for giving weight to foreign holdings on grounds other than the correctness of its reasoning . . . not an argument for overwhelming weight, but it is an argument for weight nonetheless.”⁹¹

The *ius gentium*, Waldron says, is defined by its commonality across sovereign nation states, overlapping with the positive laws of many different nations.⁹² Its commonality, moreover, is its claim of authority.⁹³ Waldron rests his case for the *ius gentium* in part on the principle of “treating like cases alike.”⁹⁴ He argues for harmonizing the law of nations on the grounds “that the peoples of the world, have constituted themselves as a single community so far as the demand for human rights is concerned . . . [and] develop[ed] a global consensus on rights to help sustain certain demands for rights that may be made here and there in the world.”⁹⁵ His argument boils down to two parts:

- (1) the administration of national bills of rights is to be understood as part and parcel of the broader enterprise of securing human rights in the world;

this country”); *id.* at 145 (“[D]iscerning the normatively relevant consensus is a matter of reflective equilibrium between the positive law experience and our sense of the right premises with which to approach this problem.”); Waldron, *supra* note 74, at 4; WALDRON, *supra* note 75, at 3, 28.

88. Waldron, *Foreign Law*, *supra* note 87, at 130.

89. WALDRON, *supra* note 75, at 3.

90. *Id.* at 28.

91. Waldron, *supra* note 74, at 35.

92. WALDRON, *supra* note 75, at 28 (“The *ius gentium* . . . is a body of positive law regulating relations within states particularly between citizen and government but also sometimes between private individuals. Its distinguishing feature is its commonality: the law of nations represents a sort of overlap between the positive laws of particular states, something they have in common. And the idea is that it has a claim on us by virtue of that commonality.”).

93. *Id.*

94. Waldron, *supra* note 74, at 17.

95. *Id.* at 33.

and (2) that broader enterprise is to be understood as subject to a principle of consistency, integrity or fairness that requires that like cases, even in different countries, be treated alike.⁹⁶

In developing his idea of the *ius gentium*, Waldron invokes Justinian's maxim: "*Omnes populi, qui legibus et moribus reguntur, partim suo proprio, partim communi omnium hominum jure utuntur*," which translates as "[e]very community governed by laws and customs uses partly its own law, partly laws common to all mankind."⁹⁷ The *ius gentium* is, Waldron stresses, a "positive law concept, not a natural law one."⁹⁸ Nor is it only about "global uniformity," for while sovereign nation states may be governed in part by laws shared with the world, they are also governed in part by laws of their own.⁹⁹ The *ius gentium* relates to "*principles which ha[ve] their own positivity right here on earth*."¹⁰⁰ The *ius gentium* in Waldron's mind is a "normative consensus . . . among lawmakers, judges, and jurists around the world."¹⁰¹ Nor is it an "intellectual consensus," but one "derived from these principles' having become established in practice as actual legal arrangements all over the known and civilized world."¹⁰²

The relevance of natural law to the *ius gentium*, however, is not entirely nonexistent. Waldron describes the *ius gentium* as the product of a "reflective equilibrium" between positive and natural law:

On its own, philosophical inquiry into natural law was conceived as unsatisfactory, but so too was a merely empirical inquiry into the existence of legal consensus. If consensus was to function normatively, it had to be less than complete (so that there could be someone whose choices were guided by it). But if one is looking for anything less than a complete consensus, then there are choices to be made, and those choices would necessarily be guided by a sense of justice and right.¹⁰³

Waldron argues that the *ius gentium* could function at various times "in both positive and critical modes"—as positive law where "legal

96. *Id.* at 31.

97. *Id.* at 3.

98. *Id.* at 8 & n.22 (citing Grotius as saying, "As for jus gentium, it is a species of jus humanum voluntarium; it is the agreement of positive law as between all or a number of peoples").

99. WALDRON, *supra* note 75, at 5.

100. Waldron, *supra* note 74, at 8.

101. *Id.* at 4.

102. *Id.*

103. JEREMY WALDRON, FOREIGN LAW AND THE MODERN *IUS GENTIUM* 7 (n.d.), available at <http://www.trinitinture.com/documents/waldron1.pdf>.

resources it offered were needed directly for the settlement of disputes” and as natural law where other systems “looked to it for inspiration or critique on matters they purported to deal with themselves.”¹⁰⁴

Waldron attempts to articulate a jurisprudence addressing “the authority accorded foreign law, confirmatory versus persuasive versus conclusive; about the areas in which foreign law should and should not be invoked . . . and about which foreign legal systems should be cited.”¹⁰⁵ In explaining how “[c]ountries learn from each other and copy each others’ laws, grafting legal conceptions from one system on to another,”¹⁰⁶ Waldron also attempts to explain why this should “dispel the serious misgivings many Americans have about this practice” and why “American courts are legally permitted or obliged to invoke non-American sources and how that practice connects with the status of courts as legal institutions.”¹⁰⁷

And yet, something from Waldron’s proposal seems to be missing. While Waldron professes to articulate more of a “complete jurisprudence” (although he does not claim to offer a wholly complete one),¹⁰⁸ we think more is needed. In our opinion, the case for citing the *ius gentium* as persuasive in the courts of sovereign nation states must rely on something more substantial than simply the desirability of “treating like cases alike.”¹⁰⁹ The best Waldron can offer is an assertion that the principles of “comity[,] . . . integrity[,] and fairness” are sometimes so important that they are best understood “in the form of the relevant legal propositions’ having a claim on us as law . . . in the world.”¹¹⁰ Dworkinian arguments such as this are highly unlikely to satisfy the opponents of American citation of foreign court decisions, since these critics virtually to a person disagree with Dworkin as well. With this line of reasoning, Waldron is merely preaching to the choir. For us, more of a concrete theory is needed, if it is even possible to develop one.

We set out to identify and articulate such a theory, and we then discuss some important limits to that theory. We argue that Friedrich A. Hayek’s arguments in favor of the virtue of spontaneous, as opposed to planned, systems of order may to some extent provide a

104. *Id.* at 8.

105. WALDRON, *supra* note 75, at 22.

106. *Id.* at 4.

107. *Id.* at 22.

108. *Id.*

109. *Id.* at 114.

110. *Id.* at 4.

compelling argument in favor of citing the *ius gentium* where the text of the U.S. Constitution makes it relevant.¹¹¹ In essence, Hayek argues that spontaneous orders can be exceedingly “complex . . . comprising more particular facts than any brain could ascertain or manipulate.”¹¹² Think “language and morals,” systems that, though possessing rules, were “the outcome of a process of evolution whose results nobody foresaw or designed.”¹¹³ Hayek claims that spontaneous systems of order are a better “adaptation to a large number of particular facts which will not be known in their totality to anyone.”¹¹⁴ In addition, we will argue large groups, under the proper conditions, are better equipped to make decisions the bigger they are.¹¹⁵

We agree with Hayek that the distinction between spontaneous and planned systems of order applies to law,¹¹⁶ and “that such law which, like the common law, emerges from the judicial process is necessarily abstract.”¹¹⁷ The global *ius gentium* that Waldron describes may be in some ways a spontaneous order formation. There is no global overseer who directs and shapes the *ius gentium*; instead, it arises naturally and independently in sovereign nation states all over the world. Just as free markets account for information pertaining to costs better than governments¹¹⁸ and “lead[] to an increase of the stream of goods and of the prospects of all participants to satisfy their needs,”¹¹⁹ and just as large groups are likelier to make better decisions than smaller groups,¹²⁰ we think

111. See generally 1 F.A. HAYEK, LAW, LEGISLATION AND LIBERTY: RULES AND ORDER (1973) [hereinafter HAYEK, RULES AND ORDER]; 2 F.A. HAYEK, LAW, LEGISLATION AND LIBERTY: THE MIRAGE OF SOCIAL JUSTICE (1976) [hereinafter HAYEK, MIRAGE]; 3 F.A. HAYEK, LAW, LEGISLATION AND LIBERTY: THE POLITICAL ORDER OF A FREE PEOPLE (1979) [hereinafter HAYEK, FREE PEOPLE].

112. HAYEK, RULES AND ORDER, *supra* note 111, at 38.

113. *Id.* at 37.

114. *Id.* at 40.

115. See JAMES SUROWIECKI, THE WISDOM OF CROWDS 10 (Anchor Books 2005) (2004).

116. HAYEK, RULES AND ORDER, *supra* note 111, at 85-89.

117. *Id.* at 86.

118. HAYEK, MIRAGE, *supra* note 111, at 116 (“Indeed, probably the most important instance of the price system bringing about the taking into account of conflicts of desires which otherwise would have been overlooked is the accounting of costs—in the interests of the community at large the most important aspect, i.e. the one most likely to benefit many other persons, and the one at which private enterprise excels but government enterprise notoriously fails.”).

119. *Id.* at 115.

120. See SUROWIECKI, *supra* note 115, at 10.

there is inherent value in looking to other sovereign nation states' courts to see how they have resolved the difficult questions that have arisen in our own legal system and that this process may enable American courts to reach better outcomes.

In this Article, we attempt to explain Friedrich Hayek's theory of spontaneous order and how it both applies to and partially justifies Waldron's conception of the *ius gentium*. In Part I, we offer criticisms of Waldron's presentation of the *ius gentium*. These include that it lacks methodology and is therefore difficult, if not impossible, to apply to the real world; that he does not give a strong enough reason to believe that foreign legal norms are relevant to our own legal system; that it is not backed by a rational, compelling normative argument; that he does not offer empirical evidence to suggest that his idea is a good one; and that he expects his readers to agree with him based on the strength of his intuition.¹²¹

In Part II, we examine the critical relevance of Hayek and argue that Hayekian jurisprudence may give substance to a theory that otherwise lacks necessary weight. We explain the difference between spontaneous and planned systems of order, and we argue for the virtue of the former. Essentially, systems of spontaneous order, such as markets and the prices that reflect them, best "secure the utilization of widely dispersed knowledge."¹²² Those rules that arise in a spontaneous order are those that "are found to be required complements of the already established rules if the order which rests on them is to operate smoothly and efficiently."¹²³ They reflect "what is demanded by general principles on which the going order of society is based."¹²⁴ Finally, we raise the example of the firm, as explained by Ronald Coase,¹²⁵ that is a planned order to illustrate our understanding of Hayek and of the relevance of his work for the *ius gentium*.

In Part III, we apply Hayek's theory directly to the *ius gentium*. We show that just as "spontaneous order . . . utilize[s] . . . the dispersed knowledge of all its members,"¹²⁶ so too giving legal force to the *ius gentium* by critically examining how other countries have confronted problems similar to those we face may give us a greater

121. See *infra* Part I.

122. HAYEK, MIRAGE, *supra* note 111, at 117.

123. HAYEK, RULES AND ORDER, *supra* note 111, at 123.

124. *Id.* at 87.

125. See generally R.H. Coase, *The Nature of the Firm*, 4 *ECONOMICA* (n.s.) 386 (1937).

126. HAYEK, RULES AND ORDER, *supra* note 111, at 51.

base of knowledge on which we can then formulate our own response.¹²⁷ We explain how the concept of Hayekian order, applied to the *ius gentium*, bridges legal positivism¹²⁸ with natural law theory¹²⁹—an argument Professor Calabresi first developed with Professor Gary Lawson when they were third-year law students at Yale in 1983 writing a paper under the supervision of Professor Anthony Kronman. Finally, we discuss where the constitutions of sovereign nation states may fit into the scheme we have described.

In Part IV, we explain the circumstances under which the decisions of large groups possess wisdom and why this is relevant to our theory.¹³⁰ Group decisions tend to be wiser than those of individuals, James Surowiecki argues, when the group is characterized by diversity of opinion, independence, decentralization, and proper aggregation.¹³¹ When these conditions are present, and they are often not present, large group decision-making is more likely to be wise¹³² rather than result in an “information cascade.”¹³³

In Part V, we examine some very powerful objections that can be levied against citing or relying on the *ius gentium*, including those based on the idea of the economics of federalism.¹³⁴ Other objections include: (1) that the “rightness” alone of foreign law is insufficient to justify our according it meaning in our system, in which questions have “local” answers rather than universally “right” answers,¹³⁵ and that reliance on foreign law threatens the sovereignty of “We, the People”;¹³⁶ (2) that it is not always clear, if we are to treat like alike, just what in comparative constitutional law counts as “like” and what is “unlike”;¹³⁷ (3) that judicial citation and reliance on the *ius gentium*

127. See *infra* Part III.

128. See generally H.L.A. HART, *THE CONCEPT OF LAW* (3d ed. 2012).

129. See generally LON L. FULLER, *THE MORALITY OF LAW* (rev. ed. 1969).

130. See *infra* Part IV.

131. SUROWIECKI, *supra* note 115, at 10.

132. *Id.*

133. See *id.* at 61.

134. See *infra* Part V.

135. See Nicholas Quinn Rosenkranz, *Condorcet and the Constitution: A Response to The Law of Other States*, 59 STAN. L. REV. 1281, 1300-01 (2007).

136. Justice Scalia’s opposition to the citation of foreign law is grounded at least in part in notions of American sovereignty. See, e.g., *Roper v. Simmons*, 543 U.S. 551, 608, 624 (2005) (Scalia, J., dissenting).

137. See Norman Dorsen, *The Relevance of Foreign Legal Materials in U.S. Constitutional Cases: A Conversation Between Justice Antonin Scalia and Justice Stephen Breyer*, 3 INT’L J. CONST. L. 519, 528 (2005) (Justice Scalia says that “[o]ne

may lead to an international oligarchy of legal elites and judges, which would be undesirable; and (4) that America's view of itself as a shining city on a hill, which is a beacon of liberty and of democracy to the world, may pose special barriers to our own reliance on the *ius gentium*.¹³⁸

In Part VI, we outline a model for under what circumstances it may be appropriate for American courts to cite foreign law.¹³⁹ We argue that all American decisions must be rooted in American law and that any decision citing foreign law should be able to stand without the citation of foreign law. That being said, we think it is sometimes appropriate to see how other nations have resolved problems similar to those we face. We argue that American courts should only look to nations with reasonably similar cultures, histories, values, and legal and economic systems as our own. When invoking foreign law, courts must not simply pick the results they like, but look at how a broad range of nations have settled the issue in question and compare the relative merits of contrasting solutions. Finally, the exercise of examining foreign law should be for the most part limited to cases involving only certain specific open-ended provisions of the Constitution, such as the Fourth and Eighth Amendments, as well as the Equal Protection Clause.

In his *Roper* dissent, Justice Scalia proclaimed that he does "not believe that the meaning of our Eighth Amendment, any more than the meaning of other provisions of our Constitution, should be determined by the subjective views of five Members of this Court and like-minded foreigners."¹⁴⁰ Waldron says there must be some sort of stronger "jurisprudential defense" and "underlying philosophy" on the citation of foreign law by American courts.¹⁴¹ We go a step further, arguing that Waldron's theory is also itself incomplete. It is an improvement upon the opportunistic application of judges' favored rules embodied in foreign legal decisions, but as is, we believe Waldron's conception of the *ius gentium* is lacking in substance. Our goal is to present a theory that more satisfyingly justifies the occasional citation of foreign law by domestic judges.

of the difficulties of using foreign law is that you don't understand what the surrounding jurisprudence is").

138. See generally Calabresi, *American Exceptionalism*, *supra* note *.

139. See *infra* Part VI.

140. 543 U.S. at 608 (Scalia, J., dissenting).

141. WALDRON, *supra* note 75, at 21-22.

I. WHY WALDRON'S *IUS GENTIUM* FRAMEWORK FALLS SHORT

Before we introduce our own theoretical justification for Waldron's *ius gentium*, it is fair to ask why it is necessary that we do so. The answer is that while Waldron presents an interesting theory that can serve as the starting point for discussion, we feel he fails to make a compelling case as to why sovereign nation states should recognize and be bound by it. Waldron's intuition is intriguing, but this is not enough. We believe that the theoretical case for why American courts should accord any weight to the foreign law of other sovereign nations and their decisions must rest on something more substantial than the simple desirability that like cases in different sovereign nation states be treated alike—more of a theory is needed.¹⁴²

To his credit, Waldron recognizes as much, saying that his aim is to present a theory and not to justify the actual use made of foreign law by American courts.¹⁴³ Indeed, Waldron humbly acknowledges that “[t]he best arguments for and against the use of foreign law are complicated, and sometimes we have to dig beneath the platitudes that are wheeled out on the one side and the xenophobic slogans that are trumpeted on the other, to find where the true arguments lie.”¹⁴⁴ Still, he counsels that “[w]e don’t want to lose touch with law in the rest of the world, for there is much to learn, and, whether we like it or not, we are part of a larger community.”¹⁴⁵ Yet the question remains—so what? Or rather, in what meaningful sense is the sovereign United States a member of a “larger community”¹⁴⁶ of other sovereign nations and of what relevance is this membership to the way we interpret our own law?

142. Waldron, *supra* note 74, at 25 (“In our national law, we sometimes justify following precedent, treating like cases alike, by appealing to the need for predictability and respect for established expectations. It is better that the law be settled, we say, than that we get it right on the merits, because only if it is settled can it serve as a basis for secure expectations. However, I doubt that this argument is going to carry us very far in the international context.”). Waldron then discusses the principle of treating like cases alike in light of the principles of fairness and Dworkinian integrity. *Id.* at 25-26.

143. WALDRON, *supra* note 103, at 15 (“My aim in this Comment has been to present a theory, not a justification of the actual use that American courts have made of foreign law. What troubled me, at the outset of this paper, was that the Supreme Court in *Roper* failed to articulate any general ideas or any standard by which its use of foreign law might be evaluated.”).

144. WALDRON, *supra* note 75, at 222.

145. *Id.* at 223.

146. *See id.*

A. Lack of a Compelling “Why?”

One criticism of Waldron’s model is that it does not offer a compelling rational, normative case for acceptance of the *ius gentium* whereby the court decisions of one sovereign nation become binding on the courts of other sovereign nations. He largely rests his argument on notions of “consistency, harmonization, and integrity,”¹⁴⁷ as well as the principle that like cases ought to be treated alike—“just as fire burns in Persia as well as in Greece, so murder is wrong in Carthage and in Rome.”¹⁴⁸ Granted, this may be a particularly compelling argument with regard to human rights law; we think Waldron makes a good point when he suggests that “human rights are the same everywhere; they are based on universal principles; so the law of human rights should be roughly the same in every country (give or take a margin of appreciation).”¹⁴⁹ A person in the United States is as naturally entitled to a certain set of rights as is a Canadian, a Spaniard, a Ghanaian, or a North Korean. If “human rights are surely the same the world over,” as Waldron rhetorically suggests,¹⁵⁰ then we believe that perhaps “the human right that prohibits cruel punishment ought to be administered in a harmonious manner.”¹⁵¹

Waldron justifies the “like cases” argument with two important concepts.¹⁵² One is “fairness”—it is not fair for two separate sovereign nation states to treat two cases differently when they are substantially the same.¹⁵³ The other is “integrity”—the idea that laws ought to be developed coherently so that they can be said to “govern[] a genuine community.”¹⁵⁴

147. *Id.* at 141. He lays out these arguments in detail in Chapter Five. *See generally id.* at 109-41.

148. Waldron, *Foreign Law*, *supra* note 87, at 134.

149. Waldron, *supra* note 74, at 18.

150. *Id.* (internal quotation marks omitted).

151. *Id.* at 25.

152. *Id.* (“Two other principles . . . used to illuminate the idea of treating like cases alike are the principle of fairness—it is unfair to treat case B differently from the way case A was treated, when the two cases are similar in all relevant respects—and the idea of integrity, which in Ronald Dworkin’s jurisprudence, is a requirement that law be developed in a coherent way, to give credibility to the idea that it governs a genuine community, even when the members of that community are divided about what the principles that govern them ought to be.”).

153. *Id.*

154. *Id.*

Many nations, including the United States, have some kind of bill of rights.¹⁵⁵ Waldron sees the bills of rights in separate sovereign nation states as components of a “global human rights enterprise,”¹⁵⁶ parts of a system of “common responsibilities laid down at the top level by the law of international human rights.”¹⁵⁷

This view is intriguing, and in fact it contains much merit, but it is not enough to justify the proposal Waldron puts forth. The motor works fine, but it just is not powerful enough to pull the eighteen-wheeler he is driving. Moreover, it is not so obvious to us that this line of reasoning works as well in fields of law other than that of human rights. All human beings may be entitled to the same set of fundamental human rights, but is it really a great evil if the people of different nations are subject to different procedures or limitations in how they make contracts, or if they are subject to somewhat different penalties for various criminal offenses, or face somewhat different property rules?¹⁵⁸ Here, the urgency of the “like cases” argument just does not seem as strong.¹⁵⁹

In fact, we think there are many federalism-related reasons to think that it may be preferable for sovereign nation states to differ in the various aspects of their legal systems.¹⁶⁰ Perhaps differing circumstances in different countries make it wise for them to approach an issue or rule differently.¹⁶¹ Just as two states that choose to handle a legal issue differently can serve as laboratories of

155. *Id.* at 21-24.

156. *Id.* at 24.

157. *Id.* at 23.

158. We use these three examples because they are three areas in which Waldron sees as amenable to a “sort of algebra of freedom . . . aiming to secure the greatest possible freedom to each, over the array of complex circumstances in which humans interact[], compatible with an equal freedom for all.” WALDRON, *supra* note 75, at 97.

159. See Waldron, *supra* note 74, at 26.

160. For a more thorough discussion of the economics of federalism, see Steven G. Calabresi & Nicholas Terrell, *The Number of States and the Economics of American Federalism*, 63 FLA. L. REV. 1 (2011) (exploring the optimal number of states in a federalist constitutional scheme); Steven G. Calabresi, “A Government of Limited and Enumerated Powers”: In Defense of *United States v. Lopez*, 94 MICH. L. REV. 752, 761-70 (1995) [hereinafter Calabresi, *Limited and Enumerated Powers*]; Steven G. Calabresi, *Federalism and the Rehnquist Court: A Normative Defense*, 574 ANNALS AM. ACAD. POL. & SOC. SCI. 24 (2001) (assessing the implications of the Supreme Court’s recent federalism jurisprudence).

161. As is true of American states. See Calabresi & Terrell, *supra* note 160, at 32-34.

experimentation and change,¹⁶² so too do we believe the adoption of diverse policies in separate countries can demonstrate to other nations what outcomes result from different approaches to the problem.¹⁶³ Finally, some issues just do not seem to call for uniformity. What about amoral differences among nations, such as the side of the road on which vehicles drive? Is there a compelling argument that all nations should have either the adversarial or the inquisitorial approach to court procedure? We do not buy it.

B. Lack of Empirical Support

Another fault we find with Waldron's theory is that he does not rely on any empirical evidence to show that what he suggests is a good idea. Before a reader commits to Waldron's proposal—that "American courts are legally permitted or [even] obliged to invoke non-American sources" of law¹⁶⁴—he or she may quite naturally want some reassurance that it is in fact a good idea, and to this end may reasonably expect some factual showing to this effect. Waldron offers no empirical, statistical support to back his claims.

Once again, it is not enough simply to invoke the idea of "treating like cases alike," as Waldron does.¹⁶⁵ This is an intuition, and a valid one, but we are not sure it demonstrates that the practical consequences of his proposal would be desirable. When we introduce our theory later in this Article, we will attempt to back it up with some data.

C. Lack of Methodology

Yet another mark against Waldron, in our book, is that his theory is not methodological. In a world of roughly 200 sovereign nation states with very different political, economic, and legal systems, not to mention customs and values, how can we tell which countries to look toward for guidance and which precedents to avoid? How much is British precedent worth compared to South African precedent? Where the Israeli and Belgian legal systems differ, to whom should we pay more accord? Does one Canadian precedent equal an Irish plus an Australian precedent? Ought we

162. *Id.* at 34-38.

163. Waldron himself acknowledges the potency of this argument. *See* WALDRON, *supra* note 75, at 221-22.

164. *Id.* at 22.

165. Waldron, *supra* note 74, at 25.

account for any Québécois influence? How? There is no formula; there are no guidelines. Waldron urges that we “not look to the work of suspect or disreputable laboratories. . . . Maybe we should not give weight to courts in Zimbabwe or the Sudan.”¹⁶⁶ This is still not much in the way of guidance, however. It is tremendously ambiguous and offers little in the way of practical assistance for discerning how to weigh and discount the laws of the many nations. This is a problem because it gives credence to those who claim that the citation of foreign law is an unscrupulous practice that permits judges to apply their own personal value judgments as the cloak of impartial legality. Waldron speaks of a jurisprudence involving “patient analysis, the untangling of issues, the ascertaining of just resolutions, and the learning and cooperation.”¹⁶⁷ In characterizing the issue as “essentially a problem-solving enterprise,” it seems to us that Waldron thinks about the question of “Whose will should prevail?”¹⁶⁸ the way Justice Potter Stewart did about pornography—he cannot quite define it, but he knows it when he sees it.¹⁶⁹

There are, in fact, many ways to quantify the weight that American courts ought to give the legal verdicts of the various sovereign nation states’ courts. We shall go over these in greater detail later, but for now let us look at three. One is population size¹⁷⁰—weighing the decisions of India’s courts, for example, more than those of Luxembourg’s. One advantage this option yields is that in large countries, courts are more constrained in what they can do. This is because they are likelier to have greater variation in the population, making it more difficult to have universal national rules. In addition, both the U.S. Supreme Court and the European Court of Human Rights give a federalism discount, or margin of appreciation, to allow for a diversity of legal rules from one individual state or territory to another.¹⁷¹ This, obviously, is a more cautious approach. Another way in which we could evaluate the weight of court decisions in other sovereign nation states is to weigh sovereign nations by GDP per capita.

This criticism, we feel, is particularly devastating for Waldron, who said that any theory regarding the citation of foreign law must

166. Waldron, *Foreign Law*, *supra* note 87, at 145.

167. *Id.* at 146.

168. *Id.* (internal quotation marks omitted).

169. *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

170. *See infra* Section V.C.

171. *See infra* Section V.B.

be complicated enough to answer a host of questions raised by the practice . . . [including] the areas in which foreign law should and should not be cited . . . and about which foreign legal systems should be cited . . . The theory has to be broad enough to explain the use of foreign law in all appropriate cases.¹⁷²

Waldron makes an analogy to the concept of *stare decisis*.¹⁷³ Judges may have different “conception[s] of the bindingness of [a] precedent,” Waldron says, but “it is surely better that he articulate such a theory than that he simply give the impression that he thinks deferring to precedent is a good idea.”¹⁷⁴ He asserts that “[w]e should require nothing less for the citation of foreign law.”¹⁷⁵ The problem is that while Waldron acknowledges that “[n]o crisp or precise litmus test defines the sort of international consensus that makes up *ius gentium* on any particular subject,”¹⁷⁶ we feel that at least some more tangible guidelines should be offered to guide the application of the *ius gentium* in practice.

Waldron says he is “not trying to assimilate legal method to the experimental methods of science”¹⁷⁷ and cautions that we ought to experiment with ““new conjectures and daring hypotheses””¹⁷⁸ in law, both “within the framework of existing paradigms and . . . challenging them,” lest we become “forever mired in a static consensus.”¹⁷⁹ In our opinion, this still does not tell us enough about what sort of theory is being challenged in the first place. Once again, more is needed.

D. Lack of American Applicability

A final criticism of Waldron’s explanation of the *ius gentium* is that he does not satisfactorily explain what reason there is to believe that the legal decisions of other sovereign nations’ courts have any

172. Waldron, *Foreign Law*, *supra* note 87, at 129.

173. WALDRON, *supra* note 75, at 23.

174. *Id.*; see also Waldron, *Foreign Law*, *supra* note 87, at 130 (“But even if one disagrees with a judge’s conception [of *stare decisis*], it is surely better that he should articulate such a theory than that he simply give the impression that he thinks deferring to precedent is a good idea.”).

175. Waldron, *Foreign Law*, *supra* note 87, at 130.

176. *Id.* at 146.

177. WALDRON, *supra* note 75, at 104.

178. *Id.* at 221 (quoting KARL POPPER, CONJECTURES AND REFUTATIONS: THE GROWTH OF SCIENTIFIC KNOWLEDGE 137 (Routledge Classics 2d ed. 2002) (1963)). Waldron uses these words in *Partly Laws Common to All Mankind*. *Id.* However, the words themselves are quoted from POPPER, *supra*, at 137.

179. WALDRON, *supra* note 75, at 221.

significance for American courts given the sovereignty in this country of “We the People of the United States.”¹⁸⁰ By this we mean why “the basic premise . . . that American law should conform to the laws of the rest of the world [] ought[n’t] . . . be rejected out of hand,” to borrow Justice Scalia’s phrasing.¹⁸¹ Perhaps other sovereign legal systems may find it permissible to lean on foreign sources of law, in part because their constitutions may authorize it,¹⁸² but this does not necessarily mean that the U.S. Constitution does the same thing. Why, many might think, should we lean on foreign law when our own system is adequately equipped to handle whatever controversies may arise? Others may learn from us, one might say, and that is fine and well, but our law is our law, and none other is. In this regard, Waldron’s appeal to treating like cases alike is not nearly compelling enough to justify something that might understandably make many Americans uncomfortable—placing our laws, to some degree, in the hands of outsiders by citing foreign legal opinions and doctrines. At best, Waldron’s justification explains why we may do this, why we might want to, or why it would be permissible. What he does not explain nearly as well as is necessary is why American courts would ever be “obliged to invoke non-American sources” of law.¹⁸³

Indeed, we think there are strong arguments against allowing American courts to rely on the foreign law of other sovereign nations at all. Justice Scalia argues that even if one believes that the Constitution should be kept up to date, it

should keep up to date with the views of the American people. And on these constitutional questions, . . . you have to ask yourself . . . what does American society think? And the best way, the only way to determine that is certainly not to ask a very thin segment of American society—judges, lawyers, and law students—what they think but rather to look at the legislation that exists in states, democratically adopted by the American people.¹⁸⁴

The concept that Americans may be bound by laws not of their own choosing, then, may be thought to contradict the notion of a sovereign people. “I doubt whether anybody would say, ‘Yes, we

180. U.S. CONST. pmb1.

181. *Roper v. Simmons*, 543 U.S. 551, 624 (2005) (Scalia, J., dissenting).

182. For example, the South African Constitution states that in “interpreting the Bill of Rights, a court, tribunal or forum . . . *must* consider international law” and “*may* consider foreign law.” S. AFR. CONST., 1996, § 39, para. 1 (emphasis added).

183. WALDRON, *supra* note 75, at 22.

184. Dorsen, *supra* note 137, at 533-34 (quoting Justice Antonin Scalia).

want to be governed by the views of foreigners,” Scalia says.¹⁸⁵ “Why is it that foreign law would be relevant to what an *American* judge does when he interprets . . . the *Constitution*?”¹⁸⁶ This is a very fair argument; it must be addressed.

The second point on this matter to bring up is that there may in fact be good reason to believe that America is very much unlike other sovereign nations, that our discrepancies with our neighbors are not incidental or irrelevant, but reflect fundamental divergences on crucial values and beliefs regarding certain economic, social, cultural, and legal matters.¹⁸⁷ If the argument for the *ius gentium* is, as Waldron says, “to harmonize the way in which the laws about fundamental rights are administered all over the world,”¹⁸⁸ one may respond, as Scalia does, that “we *don’t* have the same moral and legal framework as the rest of the world, and never have.”¹⁸⁹ President Ronald Reagan once said that the United States is a “shining city [] on a hill”¹⁹⁰ that is “a beacon, still a magnet for all who must have freedom, for all the pilgrims from all the lost places who are hurtling through the darkness, toward home.”¹⁹¹ As Professor Calabresi has argued elsewhere, “[m]ost Americans think instead that the United States is an exceptional country that differs sharply from the rest of the world and that must therefore have its own laws and Constitution.”¹⁹² Professor Calabresi has asserted that Americans are “an exceptional people and [have] an exceptional role to play in the world.”¹⁹³ He has also argued that “Americans think of the United States as an exceptional country, . . . [and] it has actually become an exceptional country Americans are more individualistic, more religious, more patriotic, more egalitarian, and more hostile to unions and Marxism than are the people of any other advanced democracy.”¹⁹⁴ In part, this is because “it has attracted

185. *Id.* at 522 (quoting Justice Antonin Scalia).

186. *Id.* at 525 (emphasis added) (quoting Justice Antonin Scalia).

187. *See generally* Calabresi, *American Exceptionalism*, *supra* note *.

188. WALDRON, *supra* note 75, at 112.

189. Dorsen, *supra* note 137, at 521 (quoting Justice Antonin Scalia).

190. Farewell Address to the Nation, 2 PUB. PAPERS 1718, 1722 (Jan. 11, 1989) (internal quotation marks omitted); *see also* Calabresi, *American Exceptionalism*, *supra* note *, at 1371.

191. Farewell Address to the Nation, *supra* note 190, at 1722; *see also* Calabresi, *American Exceptionalism*, *supra* note *, at 1372.

192. Calabresi, *American Exceptionalism*, *supra* note *, at 1337.

193. *Id.*

194. *Id.*

immigrants with a unique constellation of ideological beliefs.”¹⁹⁵ As Professor Calabresi argues, “American popular culture overwhelmingly rejects the idea that the United States has a lot to learn from foreign legal systems, including even those of countries to which we are closely related like the United Kingdom and Canada.”¹⁹⁶ What do we, then, have to learn from the foreign law of the sovereign nations? Once again, this is a valid question that shouldn’t be ignored; it beckons a thoughtful response. This, too, is a question we shall address.

Finally, in what meaningful sense can there be said to exist “‘a transcendental body of law outside of any particular State’”¹⁹⁷ Modern legal positivists say that law is “relative in a double sense: it is the law of a country because it applies to that country, and it is the law of a country because it was laid down or posited by that country’s political institutions.”¹⁹⁸ As the Court said in *Erie Railroad Co. v. Tompkins*, law “‘does not exist without some definite authority behind it.’”¹⁹⁹ It seems obvious that a person cannot be a president without being the president of some thing or some place. To ask who the president is—not the President of the United States, of France, or of Goldman Sachs, but just the president—makes so little sense that the question is hardly coherent. The same, we argue, is true of law. There is the intellectual property law of Jamaica, the intellectual property law of Japan, and the intellectual property law of the United Kingdom, but no intellectual property law full stop. If we are to assert that the *ius gentium* is authoritative, the positivist conception of law as innately relative must be challenged. But on what basis can it be challenged?

195. *Id.*

196. *Id.* (citing Calabresi & Zimdahl, *supra* note *, at 752-53).

197. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 79 (1938) (quoting *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, 276 U.S. 518, 533 (1928)).

198. WALDRON, *supra* note 75, at 17.

199. 304 U.S. at 79 (quoting *Black & White Taxicab*, 276 U.S. at 533). This concept was articulated forcefully in *Erie*. Said Justice Brandeis:

“The common law so far as it is enforced in a State, whether called common law or not, is not the common law generally but the law of that State existing by the authority of that State without regard to what it may have been in England or anywhere else.

The authority and only authority is the State, and if that be so, the voice adopted by the State as its own [whether it be of its Legislature or of its Supreme Court] should utter the last word.”

Id. (alteration in original) (quoting *Black & White Taxicab*, 276 U.S. at 533-35).

II. THE CRITICAL RELEVANCE OF HAYEK

So far we have offered several criticisms that can be made of Waldron's theory; yet, it is not our objective to argue that it ought to be dismissed out of hand. The objection we raise is not that his proposed *ius gentium* lacks merit; rather, it is that there are better arguments that can be made in its favor than those that Waldron proffers himself. It is to these that we now turn.

A. Legitimacy Through Consent

There are at least three obvious ways of legitimizing something as a source of law. One invokes consent, either of parties to a contract or of a people to be governed under a democratic system. The principle of consent lies at the core of the concept of the social contract, the implicit agreement between individuals to unite and organize themselves into political societies, follow common rules, and accept duties and responsibilities in order to prevent a state of anarchy.²⁰⁰

Randy Barnett questions whether the principle of consent can realistically be said to characterize constitutional legitimacy.²⁰¹ Barnett challenges the popular notion of consent theory as legitimizing government by denying that "consent of the governed" is a sufficient justification for constitutional legitimacy.²⁰² He argues that although "'the People' can surely be bound by their consent, this consent must be real, not fictional—unanimous, not majoritarian."²⁰³ Barnett says that "this fiction turns dangerous when factions purporting to speak for 'the People' claim the power to restrict the

200. See, e.g., THOMAS HOBBS, LEVIATHAN OR THE MATTER, FORME & POWER OF A COMMON-WEALTH ECCLESIASTICALL AND CIVILL 79-88 (McMaster Univ. Archive 1999) (1651); JOHN LOCKE, THE SECOND TREATISE OF GOVERNMENT 49-63 (J. W. Gough ed., 3d ed. 1966) (1689); JEAN-JACQUES ROUSSEAU, THE SOCIAL CONTRACT AND THE FIRST AND SECOND DISCOURSES 163-64 (Susan Dunn ed., Yale Univ. Press 2002) (1762). Also see the works of HUGO GROTIUS, MARE LIBERUM 1609-2009 (Robert Feenstra ed., Koninklijke Brill NV 2009) (1609), whose suggestions that individuals are in possession of natural rights and sovereignty (meaning that political power ultimately flows from people), that individuals are *sui juris* (under their own jurisdiction), and that breaches of others' rights should be punished heavily influenced later social contract theorists.

201. RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY 14 (2004).

202. *Id.* (internal quotation marks omitted).

203. *Id.* at 11.

liberties of all.”²⁰⁴ For this reason, Barnett believes that consent theory alone cannot legitimize a constitution, for “it is a standard that no constitution can meet.”²⁰⁵

Consent theory is obviously of little relevance to the *ius gentium*. As consent is usually given in sovereign nation states through democratic means, it is impossible to cite consent as a justification for American judicial citation of reliance on foreign law. The Framers of the Constitution and of the Reconstruction Amendments can hardly be supposed to have consented to be governed by the law of other twenty-first century sovereign nation states, and the U.S. Constitution, unlike other foreign constitutions, does not allow for international or foreign law to be made binding in the United States.

Russell Hardin rejects the idea that a constitution can be justified on the grounds of contractarianism.²⁰⁶ Instead, he says that “[t]he point of a constitution is to tie our hands in certain ways in order to discipline them to more productive use.”²⁰⁷ However, we do not think that Hardin’s coordination rationale for written constitutionalism enforced by judicial review is very helpful in justifying the *ius gentium*. To the extent that what matters is less that some specific set of rules exist than that there be *some* set of rules around which we can plan our behavior, we cannot see any reason why a system of rules involving foreign law lets us plan and coordinate any worse than one relying solely on domestic law.

The U.S. Constitution is based on the consent of the governed, and the Declaration of Independence makes the consent of the governed central to a government’s legitimacy. We believe that the generations of people who ratified the Constitution and its twenty-seven amendments did consent to the Constitution’s legitimacy and that that explains why the Constitution legally binds us today. The usual objection that is made to this argument is to say that the Constitution was ratified by only a few white male property owners, 225 years ago, and that they had no authority to bind women, African-Americans, or the many immigrants who have come to our shores since 1789.

204. *Id.* at 3.

205. *Id.*

206. Russell Hardin, *Why a Constitution?*, in *THE FEDERALIST PAPERS AND THE NEW INSTITUTIONALISM* 100, 100 (Bernard Grofman & Donald Wittman eds., 1989).

207. *Id.* at 115.

We disagree. Women have had the right to vote and run for office since 1920, and African-Americans have had that right effectively since 1965. There has been no noticeable move by any major group in American politics today to deny the legitimacy of the Constitution as it has been amended. Generations of immigrants have come to our shores because they like what the U.S. Constitution says, and there has been essentially no emigration out of the United States even though it has always been legal to emigrate for the whole of American history. A few African-Americans emigrated to Liberia in the days of slavery and of Jim Crow, and a few Americans left the U.S. to go to Canada to avoid the draft during the Vietnam War. Emigration from the United States has been negligible since 1789, but huge numbers of people want to come to the United States today and cannot do so legally because of our immigration laws. People vote with their feet, and the fact that no one wants to emigrate out of the U.S. strongly suggests that our amended Constitution continues to enjoy the consent of the governed.

This brings us to the third way of legitimizing a source of law—the inherent justice or goodness of the rule itself. This is a tricky argument, as questions of a specific law’s goodness are fraught with subjectivity. Waldron relies on the principle that “[l]ike cases in the world must be treated alike.”²⁰⁸ In our opinion, this is not enough to legitimize his theory.

B. Planned Versus Spontaneous Systems of Order

A better jurisprudential argument for the legitimacy of U.S. courts occasionally relying on or citing the law of other sovereign nation states can be deduced from the writings of Friedrich Hayek.²⁰⁹ It is this Hayekian theory of jurisprudence that forms the crux of the beginning to our argument, and to which we now turn. We think this argument supports the legitimacy of U.S. courts in citing foreign law but that it does not support making foreign law legally binding in the U.S.

Law, Legislation and Liberty may be Hayek’s *magnum opus*. For our purposes, the most relevant of the ideas he puts forth is his description of spontaneous and planned systems of order and how

208. Waldron, *supra* note 74, at 25.

209. See sources cited *supra* note 111.

they contrast with one another.²¹⁰ According to Hayek, there are two types of systems of order that can be found in the world.²¹¹ The first is made, or planned, order, also called “*taxis*” or “deliberate arrangements.”²¹² Such systems are “made by somebody putting the elements of a set in their places or directing their movements.”²¹³ Examples of planned orders include militaries, corporations, government agencies, television, families, and classical music. In these institutions, “plans owe their seeming clarity to the planner’s disregard of all the facts he does not know.”²¹⁴

The other type of systematic order is “spontaneous order,” or “*kosmos*.”²¹⁵ Unlike systems of “planned order,” systems of spontaneous order have “not been created by an outside agency” and “may persist while all the particular elements they comprise, and even the number of such elements, change.”²¹⁶ They are “very complex . . . comprising more particular facts than any brain could ascertain or manipulate.”²¹⁷ Hayek says that although spontaneous orders may possess “several nuclei,” they lack “sharp boundaries.”²¹⁸ A prime example of a spontaneous system of order is language.²¹⁹ Although nobody planned the English or French languages (or, for that matter, possibly could have), language is without a doubt a real system of social order with binding rules. There is a right way to speak English and a wrong way, even though the language grew up spontaneously and has no planning committee steering its path or guiding its constant evolution. Other systems of spontaneous order include the Internet, jazz, and free markets.

210. For our purposes, this discussion occurs primarily, although not entirely, in Volume I. See generally HAYEK, RULES AND ORDER, *supra* note 111.

211. *Id.* at 37 (“The made order which we have already referred to as an exogenous order or an arrangement may again be described as a construction, an artificial order or, especially where we have to deal with a directed social order, as an *organization*. The grown order, on the other hand, which we have referred to as a self-generating or endogenous order, is in English most conveniently described as a *spontaneous order*.”).

212. *Id.* at 38.

213. *Id.* at 37.

214. *Id.* at 15.

215. *Id.* at 38.

216. *Id.* at 39.

217. *Id.* at 38.

218. *Id.* at 37, 47 (“Although there was a time when men believed that even language and morals had been ‘invented’ by some genius of the past, everybody recognizes now that they are the outcome of a process of evolution whose results nobody foresaw or designed.”).

219. *Id.* at 37.

Hayek identifies the market as a type of spontaneous order.²²⁰ Market “activities are not governed by a single scale or hierarchy of ends,”²²¹ but nonetheless “secure a high degree of coincidence of expectations and an effective utilization of the knowledge and skills of the several members.”²²² Nobody plans to make bread available for a specific price at the local grocery store, but it is always there, seldom varying in price by much more than a quarter. “The manufacturer does not produce shoes because he knows that Jones needs them,” Hayek says.²²³ “He produces because he knows that dozens of traders will buy certain numbers at various prices because they (or rather the retailer they serve) know that thousands of Joneses, whom the manufacturer does not know, want to buy them.”²²⁴

Hayek argues that spontaneous systems of order arise naturally over time through a process of “growth” or “evolution.”²²⁵ He says that “practices which had first been adopted for other reasons, or even purely accidentally, were preserved because they enabled the group in which they had arisen to prevail over others.”²²⁶

220. *Id.* at 37-38 (“The main reason is that such orders as that of the market do not obtrude themselves on our senses but have to be traced by our intellect. We cannot see, or otherwise intuitively perceive, this order of meaningful actions, but are only able mentally to reconstruct it by tracing the relations that exist between the elements. We shall describe this feature by saying that it is an abstract and not a concrete order.”). Further, he says that “[t]he market order in particular will regularly secure only a certain probability that the expected relations will prevail, but it is, nevertheless, the only way in which so many activities depending on dispersed knowledge can be effectively integrated into a single order.” *Id.* at 42. In Volume II, he says that

[i]t is because the circumstances in which the different individuals find themselves at a given moment are different, and because many of these particular circumstances are known only to them, that there arises the opportunity for the utilization of so much diverse knowledge—a function which the spontaneous order of the market performs.

HAYEK, MIRAGE, *supra* note 111, at 9.

221. HAYEK, MIRAGE, *supra* note 111, at 108.

222. *Id.* at 107.

223. *Id.* at 115-16.

224. *Id.* at 116.

225. HAYEK, RULES AND ORDER, *supra* note 111, at 9 (“[T]hat orderliness of society which greatly increased the effectiveness of individual action was not due solely to institutions and practices which had been invented or designed for that purpose, but was largely due to a process described at first as ‘growth’ and later as ‘evolution’ . . .”).

226. *Id.*

For our purposes, the great advantage of the spontaneous system of order is its ability, as Hayek says, to process and exploit more information than any individual “could ascertain or manipulate.”²²⁷ Unlike planned orders, which are “created by an outside agency,” a spontaneous order “can have no purpose, although its existence may be very serviceable to the individuals which move within such order.”²²⁸ Such systems “are not necessarily complex, but unlike deliberate human arrangements, they may achieve any degree of complexity.”²²⁹

The elegance of the spontaneous order lies in the fact that although “each member of society can have only a small fraction of the knowledge possessed by all, and . . . is therefore ignorant of most of the facts on which the working of society rests,”²³⁰ spontaneous orders operate on the “utilization of much more knowledge than anyone can possess,”²³¹ creating “a coherent structure most of whose determinants are unknown to” members of society.²³² “In civilized society,” Hayek says, an “individual may be very ignorant, more ignorant than many a savage, and yet greatly benefit from the civilization in which he lives.”²³³ Edmund Burke expressed the benefit of spontaneous order with respect to individuals’ understanding of politics:

We are afraid to put men to live and trade each on his own private stock of reason; because we suspect that this stock in each man is small, and that the individuals would do better to avail themselves of the general bank and capital of nations and of ages.²³⁴

Hayek asserts that “most of the rules of conduct which govern our actions, and most of the institutions which arise out of this regularity, are adaptations to the impossibility of anyone taking conscious account of all the particular facts which enter into the order of society.”²³⁵ Spontaneous orders, unlike planned orders, take advantage of what Hayek calls the “fragmentation of *knowledge*,” the situation in which “each member of society can have only a small

227. *Id.* at 38.

228. *Id.* at 39.

229. *Id.* at 38.

230. *Id.* at 14.

231. *Id.*

232. *Id.*

233. *Id.*

234. EDMUND BURKE, REFLECTIONS ON THE REVOLUTION IN FRANCE 74 (Frank M. Turner ed., Yale Univ. Press 2003) (1790).

235. HAYEK, RULES AND ORDER, *supra* note 111, at 13.

fraction of the knowledge possessed by all, and that each is therefore ignorant of most of the facts on which the working of society rests.”²³⁶ The ability of society to utilize all of this dispersed knowledge is, in Hayek’s words, the principle feature of civilizations.²³⁷

Hayek argues that although “[c]omplete rationality of action” requires “complete knowledge of all the relevant facts,” we must be mindful of “the fact of the necessary and irremediable ignorance on everyone’s part of most of the particular facts which determine the actions of all the several members of human society.”²³⁸ Failure to confront this ignorance is, Hayek says, “the source of the central problem of all social order.”²³⁹ In contrast, Hayek argues that what really matters in “civilized society” is “not so much the greater knowledge that the individual can acquire, [but] the greater benefit he receives from the knowledge possessed by others.”²⁴⁰

There are some things that human beings just cannot willfully “bring about only by availing ourselves of the known forces which tend to lead to their formation.”²⁴¹ Hayek points out that we cannot “produce a crystal . . . by placing the individual atoms in such a position that they will form the lattice of a crystal.”²⁴² We can, however, “create the conditions in which they will arrange themselves in such a manner.”²⁴³ Hayek uses the example of the crystal to illustrate the important idea that in such a system, “the regularity of the conduct of the elements will determine the general character of the resulting order but not all the detail of its particular manifestation.”²⁴⁴ The outcome will depend on information “which will not be known in [its] totality to anyone.”²⁴⁵

Nonetheless, although it is now widely acknowledged that “language and morals” emerge through an evolutionary process, “in other fields many people still treat with suspicion the claim that the

236. *Id.* at 14.

237. *Id.* (“Yet it is the utilization of much more knowledge than anyone can possess, and therefore the fact that each moves within a coherent structure most of whose determinants are unknown to him, that constitutes the distinctive feature of all advanced civilizations.”).

238. *Id.* at 12.

239. *Id.*

240. *Id.* at 14.

241. *Id.* at 39.

242. *Id.*

243. *Id.* at 40.

244. *Id.*

245. *Id.*

patterns of interaction of many men can show an order that is of nobody's deliberate making."²⁴⁶ They still "cannot conceive of an order which is not deliberately made."²⁴⁷ Hayek argues that this is a "naïve" view rooted in "a deeply ingrained propensity . . . to interpret all regularity to be found in phenomena anthropomorphically, as the result of the design of a thinking mind."²⁴⁸ Hayek says that "[i]t is to this philosophical conception that we owe the preference which prevails to the present day for everything that is done 'consciously' or 'deliberately[,]' and from it the terms 'irrational' or 'non-rational' derive the derogatory meaning they now have."²⁴⁹ And yet, the idea that "beneficial institutions [are due] to design, and that only such design has made or can make them useful for our purposes, is largely false."²⁵⁰ Among the examples of spontaneous orders that Hayek provides is Adam Smith's "invisible hand" of the market.²⁵¹ "Morals, religion and law, language and writing, money and the market," were once conceived to have been purposely designed by some planner, "or at least [to] ow[e] whatever perfection they possessed to such design."²⁵² Hayek doesn't buy it,²⁵³ and neither do we. And yet many social institutions, Hayek says, are "the result of customs, habits or practices which have been neither invented nor are observed with any such purpose in view."²⁵⁴

The United States has a Hayekian tradition of revering the text of our written Constitution and its amendments. U.S. constitutional law is a spontaneous system of order that has grown up around the planned system of order of the Constitution. The Tradition of the Written Constitution best explains why U.S. constitutional law has worked so well.²⁵⁵ In our tradition, we have periodic moments where like Protestants who follow only the Bible—*sola scriptura*—we purify the law of deviations from the text. Such moments have

246. *Id.* at 37.

247. *Id.*

248. *Id.* at 9.

249. *Id.* at 11.

250. *Id.* at 9.

251. *Id.* at 37.

252. *Id.* at 10. Hayek says that this "intentionalist or pragmatic account of history found its fullest expression in the conception of the formation of society by a social contract, first in Hobbes and then in Rousseau, who in many respects was a direct follower of Descartes." *Id.* (footnote omitted).

253. *Id.* at 10-11.

254. *Id.* at 11.

255. Steven G. Calabresi, *Tradition of the Written Constitution: A Comment on Professor Lessig's Theory of Translation*, 65 *FORDHAM L. REV.* 1435 (1997).

occurred in 1937 with the New Deal;²⁵⁶ in 1954 with *Brown v. Board of Education*;²⁵⁷ in *Engel v. Vitale*,²⁵⁸ with school prayer; and in *United States v. Lopez*,²⁵⁹ with the revival of federalism.

C. The Analogy of the Firm

The difference between systems of planned order and systems of spontaneous order can be further explained through the well-known analogy of the firm.²⁶⁰ Ronald Coase describes firms or businesses as “‘islands of conscious power’” in “‘ocean[s] of unconscious co-operation.’”²⁶¹ We posit that another way of thinking of this is that firms are islands of planned order in oceans of spontaneous order—namely, free markets. In an “economic system,” the “price mechanism” is used to “co-ordinate[]” the system, to “allocat[e] . . . factors of production between different uses.”²⁶² However, in a firm, “the description does not fit at all.”²⁶³ Decisions regarding the allocation of resources are guided not by the “price mechanism,” but by an “entrepreneur-co-ordinator,”²⁶⁴ such as a CEO. When a worker moves from one department to another, Coase says, he moves not on the basis “of a change in relative prices, but because he is ordered to do so.”²⁶⁵ A different factor entirely is at play.

Coase “attempt[s] to discover why a firm emerges at all.”²⁶⁶ He concludes that they arise because of the need of entrepreneurs to save on costs.²⁶⁷ Coase argues that “the operation of a market costs something and by forming an organisation and allowing some authority (an ‘entrepreneur’) to direct the resources, certain marketing costs are saved.”²⁶⁸ They include “discovering what the

256. *Nat’l Labor Relations Bd. v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937).

257. 347 U.S. 483 (1954).

258. 370 U.S. 421 (1962).

259. 514 U.S. 549 (1995).

260. *See* Coase, *supra* note 125, at 386-88.

261. *Id.* at 388 (quoting D.H. ROBERTSON, *THE CONTROL OF INDUSTRY* 85 (1923) (“[W]e have found islands of conscious power in this ocean of unconscious co-operation, like lumps of butter coagulating in a pail of buttermilk.”)).

262. *Id.* at 387.

263. *Id.*

264. *Id.* at 389.

265. *Id.* at 387.

266. *Id.* at 390.

267. *Id.* at 392.

268. *Id.*

relevant prices are”²⁶⁹ and “negotiating and concluding a separate contract for each exchange transaction.”²⁷⁰ Another reason Coase offers for why firms come into being is that “exchange transactions on a market and the same transactions organised within a firm are often treated differently by Governments or other bodies with regulatory powers.”²⁷¹ For example, “[i]f we consider the operation of a sales tax, it is clear that it is a tax on market transactions and not on the same transactions organised within the firm.”²⁷² Moreover, Coase says that firms facilitate long-term planning.²⁷³ In addition to Coase’s reasons for the existence of firms, we speculate that another may exist as well; certain decisions may be so crucial to an enterprise’s success that they must be insulated against the possibility that the market may fail to bring about the most efficient outcome. In other words, some things may be more important to get *right* than get done cheaply. The applicability of this last point to Waldron’s *ius gentium* is that we may prefer not to trust certain important legal questions to the market-like spontaneous order of the *ius gentium* when we have what we consider to be a reliable and tested domestic system for resolving them. U.S. courts have decided an untold, enormous number of common law cases over the course of our history.²⁷⁴

269. *Id.* at 390.

270. *Id.* at 390-91.

271. *Id.* at 393.

272. *Id.*

273. *Id.* at 391 (“It may be desired to make a long-term contract for the supply of some article or service. . . . Now, owing to the difficulty of forecasting, the longer the period of the contract is for the supply of the commodity or service, the less possible, and indeed, the less desirable it is for the person purchasing to specify what the other contracting party is expected to do.”).

274. Calculating even a rough estimate of the number of cases that have been decided by American state and federal courts is a monumental task. However, we can know for a fact that American courts have certainly decided millions of common law cases since 1789. In Fiscal Year 2012 alone, a total of 278,442 cases were filed in federal district courts. *U.S. District Courts*, U.S. CTS., <http://www.uscourts.gov/Statistics/JudicialBusiness/2012/us-district-courts.aspx> (last visited Feb. 23, 2015). Eighty-five thousand, seven hundred forty-two of these, or nearly 30.8%, were diversity of citizenship cases, which very often involve matters of state common law. *Id.* In Fiscal Year 2011, 101,366 diversity cases were filed in federal district courts, constituting over 35% of their caseloads. *Id.* Moreover, state courts typically account for around 95% of all cases decided in the United States, and many of these must be common law cases. See E. Norman Veasey, *A Response to Professor Francis E. McGovern’s Paper Entitled Toward a Cooperative Strategy for Federal and State Judges in Mass Tort Litigation*, 148 U. PA. L. REV. 1897, 1898 (2000) (“Over 95% of all litigation and roughly the same

D. Common Law as Spontaneous Order

Waldron identifies the common law's "shared sense of a common legal heritage [as] something like what I have in mind when I talk about *ius gentium*, a body of law common to all humankind."²⁷⁵ In his book, Hayek identifies the common law as an example of a system of spontaneous order.²⁷⁶ The common law was not planned by an original jurist, as Napoleon planned the civil code or as Justinian planned the *Corpus Juris Civiles*. According to Lord Mansfield, the common law "'does not consist of particular cases, but of general principles, which are illustrated and explained by those cases.'"²⁷⁷ Hayek says that this in turn means that "part of the technique of the common law judge that from the precedents which guide him he must be able to derive rules of universal significance which can be applied to new cases."²⁷⁸ We conclude from this that just as "the price mechanism operates as a medium of communicating knowledge,"²⁷⁹ the common law reflects the wisdom of many judges deliberating and applying common rules and weighing common standards over the course of history.

The common law grows and changes over time even though there is no supreme judicial authority shared by those nations—Britain, America, Australia, New Zealand, and others—that practice it. But contrary to the idea that law is "'a command of a sovereign,

percentage of resources are in the state courts."'). Even accounting for the facts that judicial caseloads have increased over time, that not all state court or diversity of citizenship cases involve matters of common law, and that many cases filed in district courts are not ultimately decided in court, it seems safe to say that American courts have indeed decided a massive number of common law cases.

275. WALDRON, *supra* note 75, at 20.

276. HAYEK, *RULES AND ORDER*, *supra* note 111, at 85 (defining the common law as "a law existing independently of anyone's will and at the same time binding upon and developed by the independent courts; a law with which parliament only rarely interfered and, when it did, mainly only to clear up doubtful points within a given body of law. One might even say that a sort of separation of powers had grown up in England, not because the 'legislature' alone made law, but because it did *not*: because the law was determined by courts independent of the power which organized and directed government, the power namely of what was misleadingly called the 'legislature'").

277. *Id.* at 86 (quoting WILLIAM SEARLE HOLDSWORTH, *SOME LESSONS FROM OUR LEGAL HISTORY* 17 n.30 (1928)).

278. *Id.*

279. HAYEK, *MIRAGE*, *supra* note 111, at 125.

backed up by sanctions, and maintained by a habit of obedience,”²⁸⁰ despite its lack of a central sovereign who promulgated it, there is no doubt that in America the common law is recognized as law. As the Supreme Court has observed, “[t]he common law . . . [is] the law of that State”;²⁸¹ it is binding despite its not having been promulgated by a king, legislature, governor, or president.

In light of the nature of the common law and Hayek’s explanation of spontaneous order, we suggest that common law is validated by both consent and by its own inherent goodness.²⁸² The first proposition sounds suspect—how can society be said to have consented to obey law that nobody ever voted to adopt? Judges, who are often unelected, are the ones handing down the common law.

However, we believe that the common law is in a sense democratically legitimated by virtue of having grown out of longstanding, widely shared expectations, made concrete in litigation. Hayek describes “the proper function of all law” as “guiding expectations.”²⁸³ We posit that the common law has a degree of democratic legitimacy because it allows individuals, to quote Hayek, to “form expectations about the actions of their fellows which have a good chance of being met.”²⁸⁴ We feel that it thus expresses the customary expectations of those parties who brought litigation to court. Decisions that people objected to get challenged in new cases, and, we would argue, the common law clears itself accordingly of errors introduced in one or a few cases.

The common law is not free of errors; first, it “is of necessity gradual and may prove too slow to bring about the desirable rapid adaptation of the law to wholly new circumstances.”²⁸⁵ Hayek acknowledges that it may “develop in very undesirable directions.”²⁸⁶ Sometimes “the spontaneous process of growth may lead into an

280. Evelyn Keyes, *The Just Society and the Liberal State: Classical and Contemporary Liberalism and the Problem of Consent*, 9 GEO. J.L. & PUB. POL’Y 1, 32 (2011) (emphasis omitted) (quoting Mary Warnock, *Introduction* to JOHN STUART MILL, *UTILITARIANISM, ON LIBERTY, ESSAY ON BENTHAM* 12 (Mary Warnock ed., The World Publ’g Co. 2d prtg. 1965)).

281. *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, 276 U.S. 518, 533 (1928).

282. Hayek does not say this outright, but it seems implicit to us in his description of “the proper function of all law” as “guiding expectations” for members of society. HAYEK, *RULES AND ORDER*, *supra* note 111, at 89.

283. *Id.*

284. *Id.* at 95.

285. *Id.* at 88.

286. *Id.*

impasse from which it cannot extricate itself by its own forces or which it will at least not correct quickly enough.”²⁸⁷ Hayek compares the development of law to a “one-way street,” in that “when it has already moved a considerable distance in one direction, it often cannot retrace its steps when some implications of earlier decisions are seen to be clearly undesirable.”²⁸⁸ When this occurs, “correction by deliberate legislation may . . . be the only practicable way out.”²⁸⁹ However, Hayek’s discussion of when judge-made law requires legislative correction show that he thinks that such occasions constitute the exception, not the rule.²⁹⁰ In general, however, Hayek argues that “[t]he market order . . . is, nevertheless, the only way in which so many activities depending on dispersed knowledge can be effectively integrated into a single order.”²⁹¹

The second proposition—that the authority of the common law is normatively validated by its inherent goodness—is easier to understand. Hayek argues spontaneous orders are good because they are capable of harnessing many discrete pieces of knowledge, independently arrived at, “without this knowledge ever being concentrated in a single mind, or being subject to those processes of deliberate coordination and adaptation which a mind performs.”²⁹² In a free market,

each is made by the visible gain to himself to serve needs which to him are invisible . . . where only a few know yet of an important new fact, the much maligned speculators will see to it that the relevant information will rapidly be spread by an appropriate change of prices.²⁹³

The end result is “that all changes are currently taken account of as they become known to somebody connected with the trade.”²⁹⁴ In this process, “current prices . . . serve . . . as indicators of what ought to be done in the present circumstances,”²⁹⁵ even though they are not set by any one person. No government-commodity czar could so

287. *Id.*

288. *Id.*

289. *Id.*

290. While Hayek does not say this outright, it seems implicit in his tone; consider the following: “The fact that law that has evolved in this way has certain desirable properties does not *prove* that it will *always* be good law or even that some of its rules *may* not be very bad. It therefore does not mean that we can *altogether* dispense with legislation.” *Id.* (emphasis added).

291. *Id.* at 42.

292. *Id.* at 41–42.

293. HAYEK, *MIRAGE*, *supra* note 111, at 116.

294. *Id.*

295. *Id.*

effectively gather, process, and act on all the information a market uses to produce a good to be sold. He could not produce a good as well as the market could, for “in a centrally directed system, it would be impossible to reward people in accordance with the value which their voluntary contributions have to their fellows, because, without an effective market, the individuals could neither know, nor be allowed to decide, where to apply their efforts.”²⁹⁶ A government czar might set production targets based on last year’s needs without measuring how this year’s needs might be different. On the other hand, in a market system, “the relevant information will rapidly be spread by an appropriate change of prices,” so that information is accounted for as soon as it “become[s] known to somebody connected with the trade”²⁹⁷—in an age of algorithmic trading, this can be instantaneous. The price of financial instruments changes minute to minute, as analysts and powerful computer algorithms measure changes in a large numbers of factors and weigh them against one another. An increase in demand for oranges in Colorado would be reflected in an increase in the price of oranges, sending a signal to the market to produce more oranges.

We argue that just as free markets are more efficient than planned economies, the common law is superior to planned codes of law because it can harness many more discrete pieces of what Hayek calls “dispersed knowledge”²⁹⁸—this is because in order for the common law to satisfy “the expectations which the parties in a transaction would have reasonably formed on the basis of the general practices that the ongoing order of actions rests on,” it must have a strong sense of what those “common expectations” are, for these rules are “presumed to have guided expectations in many similar situations in the past.”²⁹⁹ This is a more substantive and persuasive argument than that the common law is binding simply because it “treat[s] like cases alike.”³⁰⁰ Hayek notes that although legal rules “will in the first instance be the product of spontaneous growth, their gradual perfection will require the deliberate efforts of judges . . . who will improve the existing system by laying down new rules.”³⁰¹ When common law rules become socially outdated or cease to conform with popular expectations, they may be challenged in court

296. *Id.* at 120.

297. *Id.* at 116.

298. HAYEK, RULES AND ORDER, *supra* note 111, at 51.

299. *Id.* at 86.

300. WALDRON, *supra* note 75, at 96.

301. HAYEK, RULES AND ORDER, *supra* note 111, at 100.

by litigants and either revised or discarded. Through this constant growing and pruning process, the common law stays up to date. To give an example, it is well-documented that a revolution in tort law occurred in the United States following World War II.³⁰² We believe that this process was due to the fact that as Americans' incomes rose after World War II, they came to prefer greater consumer safety at the cost of low prices for the products they consumed. This led to widespread changes in tort law, causing producers to display more warning labels and make products safer.

The continuous development of the common law occurs through an iterative "process of evolution in the course of which spontaneous growth of customs and deliberate improvements of the particulars of an existing system have constantly interacted."³⁰³ Paul F. Rubin argues that common law systems tend to discard inefficient rules over time and develop more efficient solutions to replace them.³⁰⁴ He has demonstrated that there is a relationship between "the presumed efficiency of the common law and the decision to use the courts to settle a dispute."³⁰⁵ Rubin argues that "it is more likely that parties will litigate inefficient rules than efficient rules."³⁰⁶ This is in part due to the fact that "efficient rules may evolve from in-court settlement, thereby reducing the incentive for future litigation and increasing the probability that efficient rules will persist."³⁰⁷ In other words, "resorting to court settlement is more likely in cases where the legal rules relevant to the dispute are inefficient, and less likely where the rules are efficient."³⁰⁸ Building on Rubin's analysis, George Priest asserts that "efficient rules will be more likely to

302. See, e.g., *Tort, Law of*, in 1 THE OXFORD ENCYCLOPEDIA OF AMERICAN POLITICAL & LEGAL HISTORY 324, 325 (Donald T. Critchlow & Philip R. VanderMeer eds., 2012); Christopher J. Roederer, *Democracy and Tort Law in America: The Counter-Revolution*, 110 W. VA. L. REV. 647, 649 (2008); Michael L. Rustad & Thomas H. Koenig, *Taming the Tort Monster: The American Civil Justice System as a Battleground of Social Theory*, 68 BROOK. L. REV. 1, 5 (2002); Lawrence M. Friedman & Jack Ladinsky, *Social Change and the Law of Industrial Accidents*, 67 COLUM. L. REV. 50, 51-54 (1967); ROBERT A. KAGAN, *ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW* 127-28 (2001); John C.P. Goldberg & Benjamin C. Zipursky, *The Easy Case for Products Liability Law: A Response to Professors Polinsky and Shavell*, 123 HARV. L. REV. 1919, 1919 (2010).

303. HAYEK, *RULES AND ORDER*, *supra* note 111, at 100.

304. See Paul H. Rubin, *Why Is the Common Law Efficient?*, 6 J. LEGAL STUD. 51, 61 (1977).

305. *Id.* at 51.

306. *Id.* at 61.

307. *Id.* at 51.

308. *Id.*

endure as controlling precedents regardless of the attitudes of individual judges toward efficiency, the ability of judges to distinguish efficient from inefficient outcomes, or the interest or uninterest of litigants in the allocative effects of the rules.”³⁰⁹ In fact, the common law process “restrain[s] and channel[s] judicial discretion so that the legal rules in force will consist of a larger proportion of efficient rules.”³¹⁰

Inefficient rules raise the stakes of litigation because “[i]nefficient assignments of liability by definition impose greater costs on the parties subject to them than efficient assignments.”³¹¹ If the cost of avoiding an accident increases, Priest argues, “the amount invested in avoidance generally will be lower.”³¹² For this reason, “the costs imposed by inefficient rules will always be higher than the costs imposed by efficient rules.”³¹³ Priest suggests that because “inefficient rules impose higher costs than efficient rules on the parties subject to them,” and because “the value to the parties from overturning the judgments that result . . . is higher,” inefficient rules are likelier to be litigated than efficient rules because “they will come up in litigation more often.”³¹⁴ Thus, Priest suggests, “if the disputes that proceed to judgment consist of a disproportionately large share which contest the appropriateness of inefficient rules, then the set of rules not contested . . . will consist of a disproportionately large share of efficient rules.”³¹⁵ Interestingly, Priest says, this is true even if judges have a “preference . . . for inefficient outcomes.”³¹⁶ As Priest explains, if inefficient rules are litigated more frequently than efficient ones, and the bulk of uncontested rules thus largely consists of efficient ones, then “[e]ven where the judiciary exercises a strong hostility to efficient outcomes, it will be unable to fully impose its bias on the total set of legal rules in force.”³¹⁷ To us, this demonstrates the wisdom of the spontaneous order of the common law. Independent of the preferences of

309. George L. Priest, *The Common Law Process and the Selection of Efficient Rules*, 6 J. LEGAL STUD. 65, 65 (1977).

310. *Id.* at 66.

311. *Id.* at 67.

312. *Id.*

313. *Id.*

314. *Id.*

315. *Id.* at 68.

316. *Id.*

317. *Id.*

individual judges, the common law approaches an efficient equilibrium.³¹⁸

Judge Posner argues that “wealth maximization, especially in the common law setting, derives support from the principle of consent that can also be regarded as underlying the . . . approach of Pareto ethics.”³¹⁹ For this reason, he says, the common law promotes efficiency.³²⁰ The reason is that “common law judges deal with problems, and by methods, in which redistributive concerns are not salient”; because the common law is not particularly well-suited to redistributive goals, “politically influential groups can do no better, in general, than to support efficient policies.”³²¹ An allocation is “Pareto-superior,” Posner explains, “if at least one person is better off under the first allocation than under the second and no one is worse off.”³²² According to Posner, the principle of Pareto superiority was developed “as an answer to the traditional problem of practical utilitarianism, that of measuring happiness across persons for purposes of determining the effect of a policy on total utility.”³²³ Because utility cannot be directly measured, however, Posner says that “the only way to demonstrate that a change in the allocation of resources is Pareto superior is to show that everyone affected by the

318. *Id.* at 70.

319. Richard A. Posner, *The Ethical and Political Basis of the Efficiency Norm in Common Law Adjudication*, 8 HOFSTRA L. REV. 487, 488 (1980) [hereinafter Posner, *Ethical and Political Basis*]. For another statement of the “efficiency theory” of common law, see Richard A. Posner, *Some Uses and Abuses of Economics in Law*, 46 U. CHI. L. REV. 281, 289, 292 (1979).

320. Posner, *Ethical and Political Basis*, *supra* note 319, at 488.

321. *Id.* For an argument that societies that aim to maximize wealth rather than utility produce desirable balances between rights, happiness, and sharing with the poor, see Richard A. Posner, *Utilitarianism, Economics, and Legal Theory*, 8 J. LEGAL STUD. 103, 135-36 (1979). For counterarguments to Posner, see Ronald M. Dworkin, *Is Wealth a Value?*, 9 J. LEGAL STUD. 191, 191 (1980); Anthony T. Kronman, *Wealth Maximization as a Normative Principle*, 9 J. LEGAL STUD. 227, 227-28 (1980). For a counter-counterargument in which Posner responds to these critics, see Richard A. Posner, *The Value of Wealth: A Comment on Dworkin and Kronman*, 9 J. LEGAL STUD. 243, 244 (1980).

322. Posner, *Ethical and Political Basis*, *supra* note 319, at 488; *see also* Jules L. Coleman, *Efficiency, Exchange, and Auction: Philosophic Aspects of the Economic Approach to Law*, 68 CALIF. L. REV. 221, 226 (1980) (providing a philosophical overview). *See generally* CATHERINE M. PRICE, *WELFARE ECONOMICS IN THEORY AND PRACTICE* (1977) (providing an economic overview).

323. Posner, *Ethical and Political Basis*, *supra* note 319, at 488; *see also* VINCENT J. TARASCIO, *PARETO’S METHODOLOGICAL APPROACH TO ECONOMICS* 79-84 (1968).

change consented to it.”³²⁴ A related concept, the “Kaldor-Hicks criterion,”³²⁵ is somewhat, but not entirely, more workable; it requires “not that no one be made worse off by the move, but only that the increase in value be sufficiently large that the losers could be fully compensated.”³²⁶ However, the problem Posner identifies with both “the Pareto criterion itself” and “the utilitarian imperative underlying the Pareto criterion” is that “there is no way of knowing whether the utility to the winners of not having to pay compensation will exceed the disutility to the losers of not receiving compensation.”³²⁷

Posner argues that the Kaldor-Hicks criterion can be justified not according to utilitarianism but “by reference to the idea of consent”³²⁸—specifically, “what economists call *ex ante* compensation.”³²⁹ The idea is that “the return to entrepreneurial activity will include a [risk] premium to cover the risk of losses due to competition,” so that in a sense “the entrepreneur is compensated for those losses *ex ante*.”³³⁰ Posner illustrates this principle with the example of a lottery: If you purchase a ticket and lose, he says “so long as there is no question of fraud or duress, you have consented to the loss.”³³¹ We are not arguing that all types of legal decisions lend themselves to Kaldor-Hicks analysis—we feel it would be inappropriate to settle issues of fundamental justice by trying to maximize total efficiency at the expense of someone’s basic rights—but when the goal is to maximize utility, we agree that Kaldor-Hicks efficiency is a useful measuring stick to use.³³² However, Posner

324. Posner, *Ethical and Political Basis*, *supra* note 319, at 488-89; *see also* GUIDO CALABRESI & PHILIP BOBBITT, *TRAGIC CHOICES* 83-85 (1978).

325. Posner, *Ethical and Political Basis*, *supra* note 319, at 491.

326. *Id.* (citing Coleman, *supra* note 322, at 239-42).

327. Posner, *Ethical and Political Basis*, *supra* note 319, at 491.

328. *Id.* at 491-92.

329. *Id.* at 492. The argument Posner presents is based on arguments laid out elsewhere in Richard A. Posner, *Epstein's Tort Theory: A Critique*, 8 J. LEGAL STUD. 457, 464 (1979); Frank I. Michelman, *Constitutions, Statutes, and the Theory of Efficient Adjudication*, 9 J. LEGAL STUD. 431, 438-40 (1980). For a related economic argument (that the undertaking of public projects satisfy the Pareto superiority criterion so long as it is sufficiently likely that a given individual will benefit from public projects over the long run, even if he does not benefit from this particular project), *see generally* A. Mitchell Polinsky, *Probabilistic Compensation Criteria*, 86 Q.J. ECON. 407 (1972).

330. Posner, *Ethical and Political Basis*, *supra* note 319, at 492.

331. *Id.*

332. Posner discusses the objection that a wealth-maximizing principle, as applied to the common law, could justify slavery “if *A*’s labor is worth more to *B* than to *A*,” but says “[s]uch cases must be very rare.” *Id.* at 500. Should conditions

argues, and we agree, that the common law is efficient because “a rule or institution that satisfies the principle of consent cannot readily be altered . . . in a way that will redistribute wealth toward some politically effective interest group.”³³³

Although both Hayek and Posner extol the efficiency of the common law, their views on the nature of law differ strongly. Professors Todd J. Zywicki and Anthony B. Sanders assert that Posner is a legal positivist, who “views law as an order consciously made through the efforts of judges and legislators”;³³⁴ in contrast, they say, Hayek sees “law as a spontaneous order—of which the best example is the common law—[that] contains and transmits knowledge that no one person or committee could ever know and, thus, regulates society better than a person or committee could.”³³⁵ Posner believes that judges “should examine an individual rule and come to a conclusion about whether the rule is the most efficient available.”³³⁶ In contrast, Hayek “conceives of law as a purpose-independent set of legal rules bound within a larger social order.”³³⁷

We have pushed the argument that the common law is efficient in part because it is a spontaneous order that draws from a wide pool of knowledge and dispersed information. But in fact, we think that Posner’s argument for the efficiency of the common law in turn means that the first justification for a source of law’s legitimacy, which we raised earlier—the premise that it is inherently consensual—is more justifiable than it appears at a glance. Posner argues that the “Kaldor-Hicks criterion can sometimes be applied without violating the principle of consent.”³³⁸ Though the Kaldor-Hicks criterion is not identical to the Pareto criterion, he says, it can

arise where slavery would be “a more efficient [way] of organizing production than any voluntary system,” Posner says, “they either arise under such different social conditions from our own as to make ethical comparison difficult, or involve highly unusual circumstances (e.g., military discipline) to which the term slavery is not attached.” *Id.* at 501 (footnote omitted). Overall, Posner says that “while the theoretical possibility exists that efficiency might dictate slavery or some other monstrous rights assignment, it is difficult to give examples where this would actually happen.” *Id.* at 502. Ultimately, Posner concludes that “it is possible to deduce a structure of rights congruent with our ethical intuitions from the wealth-maximization premise.” *Id.*

333. *Id.* at 504.

334. Todd J. Zywicki & Anthony B. Sanders, *Posner, Hayek, and the Economic Analysis of Law*, 93 IOWA L. REV. 559, 559 (2008).

335. *Id.*

336. *Id.*

337. *Id.*

338. Posner, *Ethical and Political Basis*, *supra* note 319, at 495.

“function as a tolerable and, more to the point, administrable approximation of the Pareto-superiority criterion.”³³⁹ Moreover, the “wealth-maximization norm in the common law setting” can be understood in terms of consent, Posner argues, “because common law judges deal with problems, and by methods, in which redistributive [concerns] are not salient. This means that consent to efficient solutions can be presumed.”³⁴⁰ Finally, Posner argues that the notion of consent both “is highly congenial to the Kantian emphasis on autonomy”³⁴¹ and “is the operational basis of the concept of Pareto superiority.”³⁴² “Wealth maximization as an ethical norm has the property of giving weight . . . to consent,” Posner says.³⁴³ In this way, market transactions can be justified in a way “that is unrelated to their effect in promoting efficiency,” but “on Kantian grounds”³⁴⁴ of “individual autonomy.”³⁴⁵ For these reasons, we think that the common law can in a way be described as something similar to consensual.

E. Legal Positivism Meets Natural Law

In the separate unpublished article co-written with Professor Gary Lawson in May 1983 to which we previously alluded,³⁴⁶ Professors Calabresi and Lawson offer the view that the common law unifies the contrasting theories of law put forth by the famous legal positivist H.L.A. Hart and by the famous natural law proponent Lon Fuller.³⁴⁷ In *The Concept of Law*, H.L.A. Hart argues that laws are merely rules created by human beings and that there is no necessary relationship between man-made law and morality.³⁴⁸

339. *Id.*

340. *Id.* at 488.

341. *Id.* at 490.

342. *Id.* Though perhaps “[i]t is not the theoretical basis.” *Id.*

343. *Id.* at 496.

344. *Id.* at 490.

345. *Id.* Posner says that this reasoning is similar to that expressed in ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* (1974), and Richard A. Epstein, *Causation and Corrective Justice: A Reply to Two Critics*, 8 J. LEGAL STUD. 477, 487-88 (1979).

346. See Steven G. Calabresi & Gary Lawson, *Towards a Hayekian Understanding of Jurisprudence* (May 1, 1983) (unpublished manuscript) (on file with authors).

347. *Id.*

348. HART, *supra* note 128, at 228-29 (“The rules of . . . law . . . are often morally quite indifferent. A rule may exist because it is convenient or necessary to have some clear fixed rule about the subjects with which it is concerned, but not

According to Hart, the “starting-point” of John Austin’s analysis is that the “essence of law” is a “situation where one person gives another an order backed by threats, and, in this sense of ‘oblige[,]’ obliges him to comply.”³⁴⁹ In contrast, H.L.A. Hart conceives the structure of law as a system of “primary rules of obligation with [the] secondary rules . . . ‘of recognition.’”³⁵⁰ Primary rules are those that control human behavior, prohibit actions, and create obligations.³⁵¹ Secondary rules “specify some feature or features possession of which by a suggested rule is taken as a conclusive affirmative indication that it is a rule of the group to be supported by the social pressure it exerts.”³⁵² They identify primary rules “by reference to some general characteristic possessed by the primary rules.”³⁵³ In addition, “where more than one of such general characteristics are treated as identifying criteria, provision may be made for their possible conflict by their arrangement in an order of superiority, as by the common subordination of custom or precedent to statute, the latter being a ‘superior source’ of law.”³⁵⁴ For example, Title III of the Americans with Disabilities Act of 1990, which prohibits individuals from discriminating on the basis of disability with regard to public accommodations and commercial facilities, is a primary rule—it is a rule of conduct, telling owners of public accommodations what they are legally obligated to refrain from doing.³⁵⁵ The secondary rule of recognition would be that valid laws must be passed through the process of bicameralism and presentment laid out in Article I, § 7.³⁵⁶

The most important aspect, for our purposes, of H.L.A. Hart’s theory is its stubborn positivism.³⁵⁷ According to H.L.A. Hart, there

because any moral importance is attached to the particular rule. It may well be but one of a large number of possible rules, any one of which would have done equally well.”).

349. *Id.* at 6. For more on the Austinian view of law, see generally JOHN AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED* (Wilfrid E. Rumble ed., 1995).

350. HART, *supra* note 128, at 94 (emphasis omitted).

351. *Id.* at 81.

352. *Id.* at 94.

353. *Id.* at 95.

354. *Id.*

355. Americans with Disabilities Act of 1990, Pub. L. No. 101-336, § 302, 104 Stat. 327, 355-58 (codified as amended at 42 U.S.C. § 12182 (2012)).

356. U.S. CONST. art. I, § 7.

357. HART, *supra* note 128, at 185 (“There are many different types of relation between law and morals and there is nothing which can be profitably singled out for study as the relation between them.” (emphasis omitted)).

is no necessary relationship between the law and morality.³⁵⁸ A rule need not be moral to be valid as a matter of law.³⁵⁹ This does not mean that the law must be immoral, for a valid law can coincidentally align with just standards of decency, but it is not necessary that it do so.³⁶⁰ According to H.L.A. Hart, moral, morally neutral, and wicked laws alike are all equally valid so long as they meet the standards laid out by the secondary rules of recognition.³⁶¹ Waldron characterizes Hart's view of legal positivism as the idea of "there being a practice among a group of officials to recognize it and use it in their work."³⁶²

We believe that if the *ius gentium* is defined as a system of positive law, as Waldron tries to do,³⁶³ it is not incompatible with the H.L.A. Hartian conception of positive law.³⁶⁴ Indeed, because H.L.A. Hart says that rules of recognition "may take any of a huge variety of forms, simple or complex,"³⁶⁵ citation of foreign law may be emerging in America as a legitimate source of law for judges to consider. Alternatively, on the other hand, "[w]e may be at a relatively early stage in America with the citation of foreign law in constitutional case[s]," as Waldron says, "and it is possible that American judges as a community will repudiate some of these ideas; if they do, what I am calling the *ius gentium* might cease to be law in the United States."³⁶⁶

358. *Id.*

359. *Id.*

360. *Id.* ("But it is possible to take this truth illicitly, as a warrant for a different proposition: namely that a legal system *must* exhibit some specific conformity with morality or justice, or *must* rest on a widely diffused conviction that there is a moral obligation to obey it. Again, though this proposition may, in some sense, be true, it does not follow from it that the criteria of legal validity of particular laws used in a legal system must include, tacitly if not explicitly, a reference to morality or justice.").

361. *See id.* at 116.

362. WALDRON, *supra* note 75, at 54 (citing HART, *supra* note 128, at 114-17).

363. *Id.* at 28 ("The *ius gentium*, on my conception, is a body of positive law . . .").

364. *Id.* at 55.

365. HART, *supra* note 128, at 94. Rules of recognition are defined broadly: all a rule of recognition does is "specify some feature or features possession of which by a suggested rule is taken as a conclusive affirmative indication that it is a rule of the group to be supported by the social pressure it exerts." *Id.*

366. WALDRON, *supra* note 75, at 55.

In *The Morality of Law*, Lon Fuller presents a natural law theory that contrasts sharply with H.L.A. Hart's positivism.³⁶⁷ We read Fuller to assert that man-made laws must conform to specific moral principles if they are to possess binding authority.³⁶⁸ Namely, he identifies eight routes of failure for legal systems.³⁶⁹ Legal systems lack legitimacy and laws are not laws, Fuller says, whenever the following conditions occur:

[(1) A] failure to achieve rules at all, so that every issue must be decided on an ad hoc basis. . . . (2) a failure to publicize, or at least to make available to the affected party, the rules he is expected to observe; (3) the abuse of retroactive legislation, which not only cannot itself guide action, but undercuts the integrity of rules prospective in effect, since it puts them under the threat of retrospective change; (4) a failure to make rules understandable; (5) the enactment of contradictory rules or (6) rules that require conduct beyond the powers of the affected party; (7) introducing such frequent changes in the rules that the subject cannot orient his action by them; and, finally, (8) a failure of congruence between the rules as announced and their actual administration.³⁷⁰

According to Fuller, a "total failure in any one of these eight directions does not simply result in a bad system of law; it results in something that is not properly called a legal system at all."³⁷¹ Ultimately, then, he intimates that the legitimacy of law to some degree depends on its morality.³⁷²

Lon Fuller's natural law views had a big impact on his student Ronald Dworkin, who went on to become Fuller's "successor . . . as the leading exponent of what most jurists call a 'natural law' theory."³⁷³ Dworkin, in turn, is a major influence on Jeremy Waldron.³⁷⁴ Lon Fuller's views and his disagreement with H.L.A. Hart are thus very relevant for our Article.

Calabresi and Lawson suggest in their unpublished 1983 working paper that the common law bridges the gap between legal

367. See generally FULLER, *supra* note 129.

368. See *id.* at 39.

369. *Id.*

370. *Id.*

371. *Id.*

372. See *id.*

373. William N. Eskridge, Jr., *Nino's Nightmare: Legal Process Theory as a Jurisprudence of Toggling Between Facts and Norms*, 57 ST. LOUIS U. L.J. 865, 885 (2013) (citing SCOTT J. SHAPIRO, *LEGALITY* 284-95 (2011)).

374. See, e.g., Jeremy J. Waldron, *Ronald Dworkin: An Appreciation* 8 (N.Y. Univ. Pub. Law & Legal Theory Working Papers, Paper 411, 2013), available at http://lsr.nellco.org/nyu_plltwp/411.

positivism and natural law theory.³⁷⁵ Law is not necessarily created with moral purposes in mind, they argue—it can be motivated by any number of factors, including several that contradict one another.³⁷⁶ In the common law, however, those laws that persevere over time are those that best conform to popular expectations and notions of justice.³⁷⁷ In this way, “bad” law is eventually weeded out and “good” law—law in accordance with general prevailing values—survives and grows.³⁷⁸ Laws that facilitate social harmony are preserved through time, while laws that cause discord are over time rejected and exit the common law system.³⁷⁹ Thus, the common law has both a positive and a natural law aspect.³⁸⁰ Individual laws themselves may be formulated without moral design, but the ones that get passed on through the ages are those that advance human well-being and are thus “good” in an objective sense.³⁸¹

Of course, this is a simplification. Rather than weed out “bad” law, it is more realistic to say that it allows that law to persist, which reflects widely held views in society—especially those of social elites, from which pool are drawn a disproportionate share of lawyers and judges, and who had greater means to pursue their interests in the legal system.³⁸² It cannot be denied that the common law allows views to flourish even when they are repugnant.³⁸³ Slavery, racism, and gender inequality were all established legal norms in the United States and other common law jurisdictions at some point or another.³⁸⁴ Even assuming that the common law reflects popular rather than elite opinion, there are obvious problems with saying that laws which conform to popular expectations are “good” in any objective ethical sense—some consensuses, seen later in the light of history, are staggeringly immoral. One can argue that popular consensuses should not bear on moral judgments.³⁸⁵

However, there is in fact a meaningful relationship between consensus and morality when consensus is formed among a wide variety of people from various backgrounds, with different cultural

375. See Calabresi & Lawson, *supra* note 346.

376. *Id.*

377. *Id.*

378. *Id.*

379. *Id.*

380. *Id.*

381. *Id.*

382. *Id.*

383. *Id.*

384. *Id.*

385. *Id.*

priors, who reason independently of one another.³⁸⁶ According to Professors Calabresi and Lawson, immoral legal norms, such as slavery, sustained themselves for so long because they existed in a demographically homogenous legal system dominated by affluent white men, a class that was unrepresentative of the full range of American society, and because powerful, persisting cultural and educational forces sustained them.³⁸⁷ There is reason to be skeptical that legal norms, which are the product of a narrow set of similar minds, are actually evidentiary of ethical truths.³⁸⁸ However, when people from a multitude of backgrounds and contexts all arrive independently at the same conclusion, then there is more reason to believe that they are guided by the force of the more compelling argument, rather than just self-interest, social pressure, or conformity.³⁸⁹

In this way, the development of the common law is truly analogous to Darwinian evolution.³⁹⁰ As Jonathan Weiner wrote in *The Beak of the Finch*, organisms do not choose the adaptations their species will develop through the evolutionary process.³⁹¹ Biological developments that enhance an organism's ability to survive are likelier to be passed on to its offspring than those that hinder its survival.³⁹² In the Galapagos Islands, Darwin's finches did not evolve those adaptations that the birds instinctively knew would be necessary for survival.³⁹³ The process by which natural selection operates is altogether different.³⁹⁴ "These cactus finches," Weiner writes,

all eat more or less the same food when the food is cheap, but in times of famine they tend to specialize. Those with significantly longer beaks can hammer open the fruits of the cactus and probe the cactus flowers. Those with longer and deeper beaks can crack the big, tough cactus seeds. Those that have significantly deeper beaks than the others can strip the bark from the trees to get at the bugs beneath. . . . [S]light variations can help decide who lives and who dies [F]avorable variations will be more likely to be passed down. They will spread through the population, from one

386. *Id.*

387. *Id.*

388. *Id.*

389. *Id.*

390. See generally JONATHAN WEINER, *THE BEAK OF THE FINCH: A STORY OF EVOLUTION IN OUR TIME* (1994) (providing an account of Darwinian evolution).

391. See *id.* at 146.

392. *Id.* at 66-67.

393. See generally *id.*

394. See generally *id.*

generation to the next, while variations that hurt individuals in the population will tend to dwindle and die out.³⁹⁵

Obviously, the common law is not the only legitimate source of law.³⁹⁶ Nicholas Terrell, in yet another unpublished paper—on law and Hayek, written under Professor Calabresi’s supervision and suggestion—presents a Hayekian analysis of the law linking private law, of which common law is one form; public law or legislation; and constitutional law.³⁹⁷ This private law, he says, deals with the interactions of individuals in society,³⁹⁸ while legislation regulates the organization and undertakings of government.³⁹⁹ Constitutional law, meanwhile, “create[s] and constrain[s] the agencies of government.”⁴⁰⁰ It is superior to (or supreme over) legislation and cannot be altered through ordinary legislative channels.⁴⁰¹ These three forms of law serve distinct functions, he says, and in their distinctiveness they complement one another.⁴⁰²

395. *Id.* at 66-67.

396. *See* Nicholas Terrell, Private Law, Legislation, and Constitutional Limitations: A Modern Hayekian Analysis of Law 1 (Dec. 31, 2009) (unpublished manuscript) (on file with authors) (“[T]he Common Law is more efficient than enacted laws, even though both are necessary.”).

397. *Id.* at 12 (stating that the law “covers quite a broad range of human interaction. First, it covers those interactions private individuals have among themselves—Private Law. Second, it covers those interactions between private individuals and government—Administrative Law or Public Law. Third, it covers those interactions between governments or parts of the government—Constitutional Law or Public Law”).

398. *Id.* at 5 (“*Private Law is a body of general rules regulating individual conduct that are widely recognized and supported by both moral and physical force.*”); *see also id.* at 12-13 (“Private Law arises spontaneously from the expectations of the individuals in society. It is thus neither natural nor consciously created. It is man-made in the sense that it is not predetermined by nature, but it need not be a positive enactment of any particular mind at any point in time.” (footnotes omitted)).

399. *Id.* at 14 (“Legislation . . . is that collection of regulations that are an inherent part of the functioning of government, but which do not derive from the expectations of the individuals in society. It comprises those enacted regulations whereby the government instructs its agents to take particular actions for particular ends, such as declarations of war, levying of taxes, or construction of post roads. An enactment of Legislation (at its best) attempts to improve the general welfare through collective action by the government, rather than attempting to create a framework of legally-enforceable shared expectations to facilitate interaction among private parties (as Private Law does).” (footnote omitted)).

400. *Id.* at 2.

401. *Id.* at 15 (“[T]his paper will use the term Constitutional Limitations to describe certain fundamental restrictions on both Private Law and Legislation.”).

402. *Id.* at 33-51.

Terrell claims that the authority of the common law, which is a form of private law, “exists independent[ly] of the authority of legislatures.”⁴⁰³ Because common law “derives its rules from the shared expectations of individuals in society,” it can be “dangerous to attempt to alter established rules at will through Legislation.”⁴⁰⁴ All three forms of law are necessary, Terrell says,⁴⁰⁵ and each “serves a distinct function in promoting efficiency in the legal system.”⁴⁰⁶ However, “the optimal distribution between Common Law, Legislation, and Constitutional Law,”⁴⁰⁷ he says, will recognize that the common law “will drive the bulk of legal rules toward efficiency even as circumstances change.”⁴⁰⁸ Terrell argues that though inefficient rules will be discarded or modified over time, “these changes will increase efficiency by continuously updating the rules in light of new information. . . . [S]pontaneous orders such as the Common Law are self-correcting and inherently efficient”⁴⁰⁹ Legislation, meanwhile, “injects planned order when the evolutionary path of Private Law has become stuck in an inefficient local maximum, removing it to a path that may seek the global maximum.”⁴¹⁰ It should generally be left to situations where “some changes to the social and legal landscape may be [sic] require such divergence from current law that incremental changes would not suffice,” where “the path dependence of the Common Law may result in dead ends.”⁴¹¹ Legislation also creates a framework for the administration of central governance.⁴¹² Constitutional law, meanwhile, is justified to “provide a floor to the evolutionary progress of Private Law and the enacted changes of Legislation by prohibiting some potential sets of legal rules . . . [and] define[] the boundaries of each branch of government authority and their relationships.”⁴¹³

Like Terrell’s conception of the three types of law,⁴¹⁴ Waldron’s conception of the *ius gentium* rejects a purely positivist

403. *Id.* at 1.

404. *Id.*

405. *See id.* at 1, 3.

406. *Id.* at 60.

407. *Id.* at 2.

408. *Id.* at 44.

409. *Id.* at 45.

410. *Id.* at 3.

411. *Id.* at 45.

412. *See id.*

413. *Id.* at 3.

414. *Id.*

Austinian or Hartian conception of law as a system of commands or rules laid down by sources of sovereign authority.⁴¹⁵ Both Terrell and those who would recognize the validity of the *ius gentium* understand the law to contain certain elements beyond the power of legislatures to alter.⁴¹⁶ Both Terrell and Waldron believe that law can float freely and independently of legislative authority, legitimized by its embodiment of recognized and accepted societal customs, norms, and practices.⁴¹⁷ Like Terrell, Waldron argues that an important quality of law that is not created through legislation is its integrity with existing legal conventions.⁴¹⁸ Waldron emphasizes the *ius gentium*'s coherence with global legal practices;⁴¹⁹ Terrell stresses the common law's fidelity to prevailing social expectations.⁴²⁰

Like the common law, the *ius gentium* is justified on grounds other than the authority of its creator, for there is no sole creator in either case. The common law is justified because it "arises spontaneously from the expectations of the individuals in society,"⁴²¹ which allows people to "successfully . . . pursue their plans because they can form expectations about the actions of their fellows which have a good chance of being met."⁴²² The *ius gentium* obviously is not justified by the authority of the sovereign who promulgated it, since it was not promulgated by any one sovereign. Waldron says it is justified because it "represents the accumulated wisdom of the law on certain recurrent problems, in much the way that science reflects the accumulated results of experiments in hundreds of different laboratories checking out and building upon each others' work."⁴²³ We do not disagree with Waldron on this count, but we would also point to another justificatory characteristic of the *ius gentium*, which we believe it shares with the common law. Hayek describes the virtue of spontaneous order law in evolutionary terminology:

415. See WALDRON, *supra* note 75, at 67-70.

416. *Id.* at 70; Terrell, *supra* note 396, at 1.

417. Somewhat reductively, Waldron argues that the *ius gentium* is defined by its integrity with the law of many cultures, while Terrell argues that the common law is defined by its integrity with the collective body of law of a culture. See WALDRON, *supra* note 75, at 70; Terrell, *supra* note 396, at 11.

418. See WALDRON, *supra* note 75, at 136-41.

419. *Id.*

420. Terrell, *supra* note 396, at 10-12; see also HAYEK, RULES AND ORDER, *supra* note 111, at 86.

421. Terrell, *supra* note 396, at 12.

422. HAYEK, RULES AND ORDER, *supra* note 111, at 95.

423. WALDRON, *supra* note 75, at 77.

[G]roups which happen to have adopted rules conducive to a more effective order of actions will tend to prevail over other groups with a less effective order. The rules that will spread will be those governing the practice or customs existing in different groups which make some groups stronger than others. And certain rules will predominate by more successfully guiding expectations in relation to other persons who act independently. Indeed, the superiority of certain rules will become evident largely in the fact that they will create an effective order not only within a closed group but also between people who meet accidentally and do not know each other personally.⁴²⁴

We think that, if citation of foreign law catches on among American judges to a sufficient degree, the *ius gentium* would similarly facilitate the diffusion and adoption of legal rules shown to be efficient in societies that have developed them, as the common law already does.

Of course, constitutional law is unlike common law in that a written constitution like the U.S. Constitution is planned at the outset, and thus, it is doubtful that constitutional orders can ever be described as being purely systems of spontaneous order in that sense.⁴²⁵ Terrell believes that only private law, such as the common law,⁴²⁶ can be formed through systems of spontaneous order;⁴²⁷ if this were true, then the Hayekian argument for the *ius gentium* would have no application to constitutional law, as constitutions would be wholly systems of planned order that cannot be characterized by spontaneous order processes in the first place.⁴²⁸ In fact, however, we would argue that the planned order of the Constitution can certainly give rise to systems of spontaneous order. Over time, the development of jurisprudence under the Eighth Amendment as to what types of punishment are cruel and unusual, or under the Fourth Amendment as to what types of searches or seizures are unreasonable, has occurred in an iterative, evolutionary manner,

424. HAYEK, RULES AND ORDER, *supra* note 111, at 99 (footnote omitted).

425. Cf. Terrell, *supra* note 396, at 15 (“In the short run, political considerations will require certain fundamental forms of government to be unchallengeable. Based on the difficulty of significant change, the form of a constitutional order may be taken as imposed by forces beyond the control of the present government. Although this is not technically true, it is a reasonable approximation of the observed situation over the course of a single lifetime.” (footnote omitted)).

426. Terrell defines the common law as a species of private law: “*Common Law is that body of Private Law pronounced in the decisions of courts.*” *Id.* at 10.

427. *Id.* at 12 (“Unlike Legislation and Constitutional Limitations, Private Law arises spontaneously from the expectations of the individuals in society.”).

428. *See id.*

shaped by discourse between actors such as courts, legislatures, academics, and common people.⁴²⁹ We would characterize the unfolding of this process as a type of spontaneous order, played out over time. Although various parts of the Constitution's text have been affixed at different points in time,⁴³⁰ the need to define and fill out their meanings have over the centuries given rise to a rich, spontaneous jurisprudential order involving the courts, elected policymakers, scholarship, and even the people themselves.⁴³¹

Just as firms—planned orders that buy goods in the spontaneously developing free market, characterized by “the supersession of the price mechanism,”⁴³²—are “‘islands of conscious power in this ocean of unconscious co-operation like lumps of butter coagulating in a pail of buttermilk,’”⁴³³ so too, we feel, can constitutions be described as planned legal orders whose general clauses may give rise to evolutionary or spontaneous systems of order construing them.⁴³⁴ Systems of planned order and systems of spontaneous order in human society are endlessly intertwined.⁴³⁵ Social ordering requires both kinds of order in different circumstances, and it is thus perhaps not very surprising that the two kinds of order would often coexist.⁴³⁶

F. Empirical Evidence of the Common Law's Efficiency

A final, unsurprising point that we will make on the subject of the common law for now is that there appears to be empirical evidence that the common law does produce efficient economic outcomes, and that common law countries fare better economically than civil law countries.⁴³⁷ An examination of the G-20 nations finds that common law countries have generally a higher GDP per capita

429. See generally JACK M. BALKIN, *LIVING ORIGINALISM* (2011); LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2004).

430. This is evidenced by the fact that it has been amended twenty-seven times since its enactment.

431. See generally sources cited *supra* note 429.

432. Coase, *supra* note 125, at 388-89.

433. *Id.* at 388 (quoting ROBERTSON, *supra* note 261, at 85).

434. See generally sources cited *supra* note 429.

435. See Terrell, *supra* note 396, at 50-51.

436. See *id.*

437. See Paul G. Mahoney, *The Common Law and Economic Growth: Hayek Might Be Right*, 30 J. LEGAL STUD. 503, 503 (2001).

than civil law countries.⁴³⁸ When the G-20 countries are ranked according to this metric, common law countries, such as the United States, Australia, Canada, and the United Kingdom, are clustered near the top of the list.⁴³⁹ Closer to the bottom are the civil law nations Argentina, Russia, Mexico, Turkey, Brazil, and Indonesia.⁴⁴⁰ One notable exception to this pattern is India, a common law country that is ranked 129th worldwide in terms of GDP per capita, the lowest of the G-20 nations.⁴⁴¹

Common law jurisdictions may produce superior economic outcomes because the common law promotes economic efficiency.⁴⁴² According to the “interest group” theory of public policy or the narrower “producer protection” theory, redistributive government actions are commodities that are allocated on the basis of supply and demand.⁴⁴³ Compact, organized interests will “outbid” diffuse, “rival claimants” for redistributive property—such as “the public”—because of their greater ability to “overcome free-rider problems” that impede successful political mobilization.⁴⁴⁴ Judge Posner says that “common law doctrines that satisfy the Pareto-superiority criterion . . . are plausible candidates for survival even in a political system otherwise devoted to redistribution.”⁴⁴⁵ Thus, the common law is a particularly ineffective method of redistributing wealth.⁴⁴⁶ For this reason, despite the oft-heard criticism that the common law is biased toward the rich and powerful,⁴⁴⁷ it is actually unlikely to be dominated by special interest groups even when legislatures are.⁴⁴⁸

438. See *GDP Per Capita (Current US\$)*, WORLD BANK, <http://data.worldbank.org/indicator/NY.GDP.PCAP.CD> (last visited Feb. 23, 2015).

439. *Id.*

440. *Id.*

441. See *id.*

442. See Posner, *Ethical and Political Basis*, *supra* note 319, at 502-06.

443. See *id.* at 503. The most important contributor to the economic theory of interest-group politics is George J. Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3 (1971).

444. See Posner, *Ethical and Political Basis*, *supra* note 319, at 503.

445. *Id.* at 503-04.

446. A theoretical argument to this effect is presented in Steven Shavell, *A Note on Efficiency vs. Distributional Equity in Legal Rulemaking: Should Distributional Equity Matter Given Optimal Income Taxation?*, 71 AM. ECON. REV. 414, 414 (1981).

447. See, e.g., MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780-1860*, at 259 (1977). For criticism of this strand of literature, see RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* § 8.2 (3d ed. 1986).

448. Posner, *Ethical and Political Basis*, *supra* note 319, at 505.

Professor Paul G. Mahoney argues that common law legal systems experience faster economic growth than those with civil law systems.⁴⁴⁹ Examining the period of time from 1960 through 1992, he concludes that even accounting for other variables, GDP grew at a more rapid pace in common law countries than in civil law countries.⁴⁵⁰ Mahoney attributes this difference to the common law's association with limited government and greater security of property and contract rights.⁴⁵¹ The common law and the civil law, Mahoney argues, are based on fundamentally different conceptions of the roles of individuals and the state in economic matters.⁴⁵² These systems, developed in response to specific political challenges of earlier eras, have continued to affect institutional arrangements.⁴⁵³ "At an ideological or cultural level, the civil-law tradition assumes a larger role for the state, defers more to bureaucratic decisions, and elevates collective over individual rights. It casts the judiciary into an explicitly subordinate role," Mahoney says.⁴⁵⁴ "In the common-law tradition, by contrast, judicial independence is viewed as essential to

449. See generally Mahoney, *supra* note 437. Mahoney begins with a sample of 102 countries, dividing them according to their legal family and excluding those that cannot straightforwardly be categorized as either common or civil law. *Id.* at 524 app. A. He then tests the effect of common law using ordinary least squares regression, using annual rate of real per capita GDP growth as the dependent variable and a dummy representing common or civil law identification as the independent variable. *Id.* at 514. Controlling for numerous other factors, he finds that common law countries grew, on average, 0.71% faster than civil-law countries. *Id.* at 516. Mahoney then turns to a second, extended model that includes other factors that are significantly related to economic growth but not legal origin. *Id.* The common law dummy variable, although not the most robust predictor, performs well also. *Id.* at 516-17. He constructs an additional model accounting for various anomalies associated with the regions of Sub-Saharan Africa and Latin America to meet possible objections that could be raised to his analysis. *Id.* at 517. Once again, the common law dummy is associated with higher growth, albeit of a lower magnitude and less statistical significance. *Id.* He constructs another model to test whether the common law–civil law distinction is a proxy for Protestant versus Catholic religious heritage, which yield results almost unchanged from model three. *Id.* at 517-18. He then runs additional models using different variables and testing for different conditions than those already run. See *id.* at 519. The results yielded indicate that common law leads to improvements in property and contract rights that assist economic growth. *Id.* at 523. They also suggest that the relationship between growth and property and contract rights "is causal, . . . not . . . a consequence of simultaneity." *Id.*

450. *Id.* at 514-23.

451. *Id.* at 507.

452. *Id.*

453. *Id.* at 505-13.

454. *Id.* at 511.

the protection of individual liberty.”⁴⁵⁵ English common law, Mahoney argues, was developed during the seventeenth century to protect landed aristocrats and merchants against “the Crown’s ability to interfere in markets.”⁴⁵⁶ In contrast, the French civil law, developed in the eighteenth and nineteenth centuries by the revolutionary generation in France and by Napoleon afterward, sought to use the power of the state to modify property rights, redistribute wealth, and prevent judicial interference in these endeavors.⁴⁵⁷

This difference, Mahoney says, is reflected in the distinct roles of judges in each system.⁴⁵⁸ “Judges are invested with greater prestige and insulated more from political influence in common-law systems,”⁴⁵⁹ he notes; the common law judge “is an independent policy maker occupying a high-status office, whereas in the civil-law system, the judge is a (relatively) low-status civil servant without independent authority to create legal rules.”⁴⁶⁰ In contrast to the common law, for which “security of economic rights was the motivating force in [its] development,” Mahoney argues that “security of executive power from judicial interference was the motivating force in the post-Revolution legal developments that culminated in the *Code Napoleon*.”⁴⁶¹ This means that common law judges have a greater ability to curb government meddling in economic matters than their civil law counterparts.⁴⁶²

Building on Mahoney’s insights, others have noted that free-market relations stand on “safer judicial ground” in common law countries for several reasons.⁴⁶³ Common law judges tend to be legal practitioners, rather than civil administrators or bureaucrats.⁴⁶⁴ In addition, legal institutions in common law systems evolve gradually over time rather than in fits and spurts, and are characterized by the development of institutional checks and balances to support private

455. *Id.*

456. *Id.* at 504, 508-09.

457. *Id.* at 509-11.

458. *Id.* at 507.

459. *Id.* at 523.

460. *Id.* at 507.

461. *Id.* at 509.

462. *Id.* at 511-13.

463. See Benito Arruñada & Veneta Andonova, *Common Law and Civil Law as Pro-Market Adaptations*, 26 WASH. U. J.L. & POL’Y 81, 82 (2008). See generally Edward L. Glaeser & Andrei Shleifer, *Legal Origins*, 117 Q.J. ECON. 1193 (2002).

464. Arruñada & Andonova, *supra* note 463, at 82.

property rights.⁴⁶⁵ Glaeser and Shleifer trace the divergence in outcomes between common law and civil law societies all the way back to the twelfth and thirteenth centuries, when England adopted the jury system and France adopted Romano-canonical procedure, in which justice is more centralized.⁴⁶⁶ In response, Klerman and Mahoney argue that, prior to the French Revolution, justice was more centralized in England than in France, and that the divergence occurred from the seventeenth through the nineteenth centuries due to political choices.⁴⁶⁷ Others dispute the relative efficiency superiority of common law over civil law, arguing that such conclusions are based on “cherry-pick[ed]” information.⁴⁶⁸ Sarkar, meanwhile, finds that common law countries provide better creditor protection relating to credit contract and insolvency, while “civil law countries . . . provided [better] minority shareholder protection and creditor protection relating to debtors’ control.”⁴⁶⁹ He ultimately “questions the proposition that common-law countries provide more protection to their shareholders and creditors . . .”⁴⁷⁰

The belief that the structure of a society’s legal system materially impacts its level of material or economic prosperity is borne out by a sizeable body of economic literature indicating that the efficiency of the common law produces superior economic outcomes in nations whose legal systems use it.⁴⁷¹ The essential idea that common law produces economic benefits is widely shared.⁴⁷²

465.

The understanding by English judges of the fundamentals of the market economy also benefited from the early checks imposed on royal authority, as these checks limited the ability of the Crown to sell new public offices, making judgeships secure investments and converting early common law judges into defenders of private property rights.

Id. at 101 (citations omitted).

466. Glaeser & Shleifer, *supra* note 463, at 1198-1201.

467. Daniel Klerman & Paul G. Mahoney, *Legal Origin?*, 35 J. COMP. ECON. 278, 280-86 (2007).

468. Nuno Garoupa & Carlos Gómez Ligüerre, *The Syndrome of the Efficiency of the Common Law*, 29 B.U. INT’L L.J. 287, 306-07 (2011) (internal quotation marks omitted).

469. Prabirjit Sarkar, *Common Law vs. Civil Law: Which System Provides More Protection to Shareholders and Creditors and Promotes Financial Development* 25 (Munich Pers. RePEc Archive, Paper No. 32930, 2011), available at http://mpra.ub.uni-muenchen.de/32930/1/MPRA_paper_32930.pdf.

470. *Id.*

471. See, e.g., Mahoney, *supra* note 437, at 503; Arruñada & Andonova, *supra* note 463, at 82.

472. See, e.g., Mahoney, *supra* note 437, at 503; Arruñada & Andonova, *supra* note 463, at 82.

One explanation for the common law's economic superiority may be that it is a system by which "many activities depending on dispersed knowledge can be effectively integrated into a single order."⁴⁷³ The common law system benefits from the ability to reach across broad temporal and geographic distances to capitalize on the collective wisdom of multitudes of jurists, as it does not suffer for "the unalterable ignorance of any single mind, or any organization that can direct human action, of the immeasurable multitude of particular facts which must determine the order of its activities."⁴⁷⁴

We believe that the *ius gentium*, like the common law which Hayek describes as "existing independently of anyone's will and at the same time binding upon and developed by the independent courts,"⁴⁷⁵ can be understood as a system of spontaneous legal order able to process larger amounts of disparate bits of information than any central planner could. The *ius gentium* may allow American judges to utilize knowledge from the global jurisprudential universe rather than the more limited set of knowledge within our domestic legal universe. The benefit of allowing American courts to access the information contained within foreign legal judgments may well be more efficient judicial decision-making. Hayek understood that while "[c]omplete rationality of action in the Cartesian sense demands complete knowledge of all the relevant facts," the truth is that "the success of action in society depends on more particular facts than anyone can possibly know."⁴⁷⁶ But although "the necessary and irremediable ignorance on everyone's part of most of the particular facts which determine the actions of all the several members of human society"⁴⁷⁷ is an unavoidable reality, a spontaneous "order will utilize the separate knowledge of all its several members, without this knowledge ever being concentrated in a single mind, or being subject to those processes of deliberate coordination and adaptation which a mind performs."⁴⁷⁸ Law,⁴⁷⁹ like language or free markets,⁴⁸⁰ is a spontaneously arising system of

473. See HAYEK, RULES AND ORDER, *supra* note 111, at 42.

474. HAYEK, FREE PEOPLE, *supra* note 111, at 130.

475. HAYEK, RULES AND ORDER, *supra* note 111, at 85.

476. *Id.* at 12.

477. *Id.*

478. *Id.* at 41-42.

479. *Id.* at 85-88.

480. *Id.* at 37.

order that makes “[t]he utilization of factual knowledge widely dispersed among millions of individuals . . . clearly possible.”⁴⁸¹

There are today dozens of constitutional democracies with bills of rights and judicial review inspired by the American examples. These countries have separately and independently written bills of rights, and their supreme courts, or constitutional courts, have separately interpreted national constitutions in deciding cases. We believe that all the preconditions for a Hayekian, constitutional spontaneous order may very well have been met. The *ius gentium* thus has many of the attributes that Hayek attributes to systems of spontaneous order.

III. THE *IUS GENTIUM* AS SPONTANEOUS ORDER

The relevance of Hayek’s theory of spontaneous order to the *ius gentium* should be clear. The emerging global *ius gentium* on constitutional and human rights issues that Waldron identifies may be itself to some extent a spontaneous system of order.⁴⁸² It is emerging spontaneously and independently in different courts in sovereign nation states all over the world, unguided by any global sovereign or supreme court proclaiming it.⁴⁸³

We posit that the *ius gentium*’s development is analogous to a spontaneous order in that it “constantly adapts itself, and functions through adapting itself, to millions of facts which in their entirety are not known to anybody.”⁴⁸⁴ For this reason, as Hayek makes clear, it may be information and knowledge superior in the way that a market is superior to a Soviet-style planned economy.⁴⁸⁵ In such a state-run economy, prices do not “serve . . . as indicators of what ought to be done in the present circumstances”⁴⁸⁶ because a planner or government czar determines prices. In free market systems, however, they are signals that summarize millions, billions, even, of highly diffused pieces of information.⁴⁸⁷ This is why prices can effectively coordinate economic activity in free markets, but are virtually useless for doing so in planned economies.⁴⁸⁸

481. HAYEK, *MIRAGE*, *supra* note 111, at 8.

482. *See generally* WALDRON, *supra* note 75.

483. *See generally id.*

484. HAYEK, *RULES AND ORDER*, *supra* note 111, at 13.

485. HAYEK, *MIRAGE*, *supra* note 111, at 116.

486. *Id.*

487. *Id.*

488. *See id.*

We believe there is also an element of democratic consent when so many different countries all arrive at such strikingly similar rules. The constitutions and bills of rights of Germany, India, South Africa, Canada, Israel, Japan, Brazil, and France, as well as the European Convention on Human Rights and Freedoms, were all adopted at different times, by different constitutional conventions, independently of one another. Germany's Basic Law, for instance, was approved in 1949,⁴⁸⁹ four years after the end of World War II. The South African Constitution was ratified by the Constitutional Assembly in 1996 and took effect in 1997.⁴⁹⁰ In accordance with the Harrari Decision, Israel's Constitution is technically a work in progress, though the country has enacted several Basic Laws since then.⁴⁹¹

And yet, despite differences in constitutional origin, nations often reach remarkably similar conclusions on issues of constitutional significance. In *Washington v. Glucksberg*, the U.S. Supreme Court found that the Due Process Clause of the Fourteenth Amendment does not protect the right to assistance in committing suicide.⁴⁹² Many other constitutional courts, or their equivalents, have reached similar judgments on the merits with regard to the right to euthanasia, including Canada (*Rodriguez v. British Columbia*),⁴⁹³ Hungary (*Decision 22/2003*),⁴⁹⁴ and the European Court of Human Rights (*Pretty v. United Kingdom*).⁴⁹⁵ Likewise, constitutional court decisions protecting the right to homosexual sexual intimacy have been handed down in the United States (*Lawrence v. Texas*)⁴⁹⁶ and South Africa (*National Coalition for Gay & Lesbian Equality v. Minister of Justice & Others*),⁴⁹⁷ as well as by the Human Rights Committee of the United Nations (*Toonen v. Australia*)⁴⁹⁸ and the

489. DONALD P. KOMMERS, THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY 4 (2d ed. 1997).

490. HEINZ KLUG, THE CONSTITUTION OF SOUTH AFRICA: A CONTEXTUAL ANALYSIS 6, 45-46 (2010).

491. See SUZIE NAVOT, CONSTITUTIONAL LAW OF ISRAEL 35-37 (2007).

492. 521 U.S. 702, 735 (1997).

493. *Rodriguez v. British Columbia* (Att'y Gen.), [1993] 3 S.C.R. 519, 521 (Can.).

494. Alkotmánybíróság (AB) [Constitutional Court] Apr. 28, 2003, MK.22/2003 (IV. 28) (Hung.).

495. 35 Eur. Ct. H.R. 1, 41 (2002).

496. *Lawrence v. Texas*, 539 U.S. 558, 578 (2003).

497. 1999 (1) SA 6 (CC) at 7 (S. Afr.).

498. Rep. of the Human Rights Comm., 50th Sess., U.N. Doc. CCPR/C/50/D/488/1992 (Apr. 4, 1994).

European Court of Human Rights (*Dudgeon v. United Kingdom*).⁴⁹⁹ Numerous constitutional courts around the world have either found or recognized some form of a right to counsel appointed and paid for by the state for criminal defendants, including courts in South Africa (*State v. Wessel Albertus Vermaas*),⁵⁰⁰ Japan (*Ogawa et al. v. Japan [Defense Rejection Case]*),⁵⁰¹ India (*Madhav Hayawadanrao Hoskot v. Maharashtra*),⁵⁰² Australia (*Dietrich v The Queen*),⁵⁰³ and the United States (*Powell v. Alabama*, *Gideon v. Wainwright*, *Brewer v. Williams*).⁵⁰⁴

In 2011, ruling that “it is not fair or just that a criminal case should be decided against an accused in the absence of a counsel,”⁵⁰⁵ the Indian Supreme Court cited *Powell*, *Gideon*, and *Brewer*⁵⁰⁶ and noted that the right to counsel has long roots and “has existed in England for over three centuries.”⁵⁰⁷ It noted that in ancient Rome, there were “great lawyers e.g. [sic] Cicero, Scaevola, Crassus, etc. who defended the accused,” and that “[e]ven in the Nuremberg trials the Nazi war criminals, responsible for killing millions of persons, were yet provided counsel.”⁵⁰⁸ It concluded that, in affirming an accused’s right to be provided counsel, the Court was “not bringing into existence a new principle but simply recognizing what already existed and which civilized people have long enjoyed.”⁵⁰⁹

Obviously, very few legal norms find expression in the laws of all the countries of the world. Unanimous consent on issues of

499. 4 Eur. Ct. H.R. 149, ¶ 61 (1981).

500. 1995 (3) SA 292 (CC) (S. Afr.).

501. Saikō Saibansho [Sup. Ct.] July 24, 1979, 33 SAIKŌ SAIBANSHO KEIJI HANREISHŪ [KEISHŪ] 416 (Japan), *translated in* LAWRENCE W. BEER & HIROSHI ITOH, *THE CONSTITUTIONAL CASE LAW OF JAPAN, 1970 THROUGH 1990*, at 443 (1996).

502. (1979) 1 S.C.R. 192 (1978) (India).

503. (1992) 177 CLR 292 (Austl.). In Australia, a criminal defendant does not have a “right to have counsel appointed at public expense in serious indictable matters,” *id.* ¶ 32, but a court may, in its discretion, stay proceedings so that a defendant may obtain counsel, though it need not do so, *id.* ¶ 31. It is probably fairer to characterize the formulation of the criminal defendant’s “right” to counsel as more of an interest, as opposed to a pure right, which a court may or may not indulge. *See id.*

504. *Powell v. Alabama*, 287 U.S. 45, 73 (1932); *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963); *Brewer v. Williams*, 430 U.S. 387, 405-06 (1977).

505. *Md. Sukur Ali v. Assam*, Unreported Judgments 2011, at 5 (India).

506. *Id.* at 3, 8.

507. *Id.* at 5.

508. *Id.*

509. *Id.*

fundamental constitutional questions is rare, if not nonexistent. Even broad global consensuses that fall just short of unanimity, such as that which the Supreme Court found to exist with regard to the juvenile death penalty in *Roper*,⁵¹⁰ are very uncommon. Nonetheless, when a large number of nations agree on a legal approach to a common problem, perhaps we ought to pay attention and at least take their judgments, as well as the processes of reasoning by which those decisions were reached, into consideration. When a diverse body of nations from across the globe, with different histories, languages, economic systems, social orders, religious practices, and cultural traditions, reaches the same conclusion on a matter of fundamental constitutional importance, the result is characterized by something resembling democratic consent. The common aspect of so many different legal systems can be compared to the outcome of an open democratic election with participation by a diverse cross-section of citizens. The fact that so many nations, markedly different in other respects, all reach the same legal outcome may indicate that there is something inherently wise, just, or efficient about it.

A. A Hayekian Argument for the *Ius Gentium*

Spontaneous systems of order are able to absorb and to utilize large quantities of dispersed knowledge to reach better outcomes than any planner could preordain and design.⁵¹¹ On the basis of this principle, we believe that when an American court examines the laws and judicial decisions of foreign sovereign nation states, it gains knowledge of sorts that it did not possess before by learning about how other societies dealt with a problem similar to that which confronts it now. If we believe, as Posner and Sunstein do, that the “the practices of others provide relevant information, and that courts ought not to ignore such information,”⁵¹² then we would argue that

510. *Roper v. Simmons*, 543 U.S. 551 (2005).

511. See, e.g., HAYEK, RULES AND ORDER, *supra* note 111, at 15 (“And one of the ways in which civilization helps us to overcome that limitation on the extent of individual knowledge is by conquering ignorance, not by the acquisition of more knowledge, but by the utilization of knowledge which is and remains widely dispersed among individuals. The limitation of knowledge with which we are concerned is therefore not a limitation which science can overcome. Contrary to a widely held belief, science consists not of the knowledge of particular facts; and in the case of very complex phenomena the powers of science are also limited by the practical impossibility of ascertaining all the particular facts which we would have to know if its theories were to give us the power of predicting specific events.”).

512. See Posner & Sunstein, *supra* note 71, at 136.

same effect occurs when an American court looks at the laws and rules of the fifty U.S. states for guidance in deciding a case.⁵¹³ This is something U.S. courts do all the time, including in the decision of constitutional cases.⁵¹⁴

We argue that looking toward other countries' laws and judicial decisions gives us a broader base of knowledge from which point we can then make our own decisions. The *ius gentium* may thus be smart in the way that free markets are smart.⁵¹⁵ Market economies are efficient because they "enable[] each individual to gain from the skill and knowledge of others whom he need not even know and whose aims could be wholly different from his own";⁵¹⁶ we would argue that likewise, by borrowing or perusing the works of other competent courts, the *ius gentium* allows a court to outsource the intellectual labor necessary to reach a fuller understanding of the issue then before it. Waldron already acknowledges that when foreign courts do cite each other's judgments, they do so because "[t]hey share a sense of drawing down from the same body of intellectual legal resources, a sense that each country is contributing to a common storehouse, and they cannot imagine doing without it."⁵¹⁷ In this sense, his argument embraces the wisdom and virtue of spontaneous orders,⁵¹⁸ though we think he would do well to elaborate on this point and express it more clearly.⁵¹⁹

513. Cf. *id.* at 133-36 ("[T]he Jury Theorem formalizes the simple intuition that the practices of others provide relevant information, and that courts ought not to ignore such information. . . . [I]t suggests that if the majority of states believe that *X* is true, there is reason to believe that *X* is in fact true."); *id.* at 178-79 ("[T]he debate over consideration of foreign law by the U.S. Supreme Court should be seen not in isolation, but instead in the context of the frequent consultation, by state and national courts alike, of law that is 'foreign' in the sense that it does not emanate from the particular sovereign whose law is being interpreted. . . . The Jury Theorem disciplines the intuition that underlies current arguments on behalf of consulting foreign law, which is that *the practices of other states provide valuable information.*" (emphasis added)).

514. See, e.g., Gregory A. Caldeira, *Legal Precedent: Structures of Communication Between State Supreme Courts*, 10 SOC. NETWORKS 29, 29 (1988) [hereinafter Caldeira, *Legal Precedent*]; Gregory A. Caldeira, *On the Reputation of State Supreme Courts*, 5 POL. BEHAV. 83, 83 (1983) [hereinafter Caldeira, *State Reputation*].

515. HAYEK, *MIRAGE*, *supra* note 111, at 109-13.

516. *Id.* at 109.

517. WALDRON, *supra* note 75, at 20.

518. See *id.*

519. Although Waldron speaks of "shar[ing] a sense of drawing down from the same body of intellectual legal resources," he seems more focused on the idea of a shared methodology, a "lawyer's method—analysis, abstraction, analogy," rather

According to neoclassical theory, free market outsourcing often occurs because the cost of foreign labor is cheaper than the cost of domestic labor.⁵²⁰ Another reason it might occur, however, is if there is simply too small a supply of domestic labor on hand, in which case it may become necessary to hire foreign workers to perform part of a larger task.⁵²¹ In law, the task of reaching a fully informed understanding of the relevant legal issue and principles in a particular case is so immense that only Dworkin's fictitious Judge Hercules could perform it perfectly.⁵²² In reality, judges are called upon to approximate this task to the best of their ability given the limited resources, including time and knowledge, they possess. It is understood that they may never reach the goal to which they strive—a perfect balancing of facts, laws, and principles that produces the perfect result in a given situation—but strive they must nonetheless, for the metric by which their aptitude as jurists is measured is how close they come to this ideal. The ideal is the judge's asymptote, something she can approach but never quite actually touch.

Here, the purpose of outsourcing an American court's intellectual work is not that the U.S. court is less capable of reaching a fair decision than one of its foreign counterparts. Rather, it is that the task before it may be too immense for any one body to complete on its own. Can two, or three, or more? Probably not—it is an impossible task. But the more knowledge is shared—the more information the court takes in—the better it may perform this task as the economic transactions of individuals in a market sync up with each other, without formal coordination, to maximize total welfare.⁵²³

It has been observed in recent decades that Americans are similarly sorting themselves along demographic lines, through no

than the information itself that the *ius gentium* provides or the idea of the *ius gentium* as a spontaneous order providing valuable information. *Id.*

520. For elucidation of this idea, see Dean Russell, *Cheap Foreign Labor*, FREEMAN (Jan. 1, 1977), http://www.fee.org/the_freeman/detail/cheap-foreign-labor.

521. For instance, in the United States, to qualify for H-2B non-immigration classification, a petitioner must establish among other things that “[t]here are not enough U.S. workers who are able, willing, qualified, and available to do the temporary work.” See *H-2B Temporary Non-Agricultural Workers*, U.S. CITIZENSHIP & IMMIGR. SERVICES, <http://www.uscis.gov/working-united-states/temporary-workers/h-2b-non-agricultural-workers/h-2b-temporary-non-agricultural-workers#Qualify> (last visited Feb. 23, 2015).

522. The Judge Hercules character appears throughout Dworkin's works to illustrate his theory of law as integrity. See RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 105 (1977) [hereinafter DWORKIN, *TAKING RIGHTS SERIOUSLY*]; RONALD DWORKIN, *LAW'S EMPIRE* 239 (1986) [hereinafter DWORKIN, *LAW'S EMPIRE*].

523. HAYEK, *MIRAGE*, *supra* note 111, at 109-13.

central planning, to form homogenous communities compatible with their preferred values, beliefs, and lifestyles.⁵²⁴ Bill Bishop chronicles these trends in self-selection in *The Big Sort*, the thesis of which is that “[o]ver the past thirty years, the United States has been sorting itself, sifting at the most microscopic levels of society . . . in every corner of society, people [are] creating new, more homogenous relations.”⁵²⁵ Demographic sorting, Bishop suggests, is producing remarkably homogeneous communities not just at the regional level, but also within cities and even in neighborhoods.⁵²⁶ “As Americans have moved over the past three decades, they have clustered in communities of sameness, among people with similar ways of life, beliefs, and, in the end, politics.”⁵²⁷ This sorting does not merely involve decisions such as where to live, Bishop argues, but even what churches and civic organizations to join.⁵²⁸ While this wide-scale demographic sorting may contribute to an increase in political polarization as people become less able to understand those who are unlike them,⁵²⁹ we argue that it has the undeniable benefit of efficiently distributing social goods to those for whom they produce the greatest utility. In much the same way, we feel that legal borrowing may enhance courts’ abilities to locate and capitalize on relevant and illuminative information contained in foreign judgments to reach the best and most efficient legal outcomes.⁵³⁰

We feel there is also something inherently capitalistic and democratic about the idea of allowing different approaches to compete in the marketplace of ideas, with those approaches that are most attractive tending to wind up widely adopted or copied. In the words of Justice Sonia Sotomayor, “[i]deas are ideas . . . and whatever their source, whether they come from foreign law, or international law, or a trial judge in Alabama . . . if it persuades

524. See BILL BISHOP, *THE BIG SORT: WHY THE CLUSTERING OF LIKE-MINDED AMERICA IS TEARING US APART* 5 (2008).

525. *Id.* at 5-6.

526. *Id.* at 5 (“Little, if any, of this political migration was by design, a conscious effort by people to live among like-voting neighbors. When my wife and I moved to Austin, we didn’t go hunting for the most Democratic neighborhood in town. But the result was the same . . .”).

527. *Id.*

528. *Id.* at 6.

529. *Id.*

530. Or, as Justice Breyer says, “I understand that a judge cannot read everything. But if the lawyers find an interesting and useful foreign case, and if they refer to that case, the judges will likely read it, using it as food for thought, not as binding precedent. I think that is fine.” Dorsen, *supra* note 137, at 524.

you . . . then you're going to adopt its reasoning. If it doesn't fit, then you won't use it."⁵³¹ When there is a problem that many nations face in some form or another, then as Posner and Sunstein say, "the practices of other states provide valuable information. . . . [W]hen many courts have adopted a course of action, it makes a great deal of sense to attend to their shared practice."⁵³² We believe, as Waldron does, that a legal approach found in other countries may sometimes be part "of a common stock of doctrine and principle that we draw from . . . [that] has established itself as a tried and tested result."⁵³³ Otherwise, why would it be so widely adopted?

Information may be valuable, but as Calabresi and Terrell observe, it "is expensive to obtain in both time and money . . . [and] must be acquired through the expenditure of scarce resources, particularly time and effort."⁵³⁴ The term "rational ignorance" refers to the idea that "[o]nce the marginal cost of acquiring additional information becomes greater than its marginal value, . . . [one] has no incentive to learn more."⁵³⁵ In *Knowledge and Decisions*, Thomas Sowell argues that a primary advantage of contemporary civilization over more primitive eras is "not necessarily that each civilized man has more knowledge but that he *requires* far less."⁵³⁶ We posit that one virtue of the *ius gentium* is that it is, as Sowell describes civilization, "an enormous device for economizing on knowledge."⁵³⁷

As Sowell notes, today "the civilized accountant or electronics expert, etc., need know little beyond his accounting or electronics."⁵³⁸ We do not need to understand the complex web of "technical, economic, and political intricacies" that explain, to use Sowell's examples, how "food reaches [our] local supermarket," or how our

531. Julia Salvatore, Suparna Salil & Michael Whelan, Comment, *Sotomayor and the Future of International Law*, 45 TEX. INT'L L.J. 487, 498 (2009) (second and third alterations in original) (quoting Justice Sonia Sotomayor, Speech to the ACLU of Puerto Rico (Apr. 2009), available at http://www.heritage.org/research/reports/2009/07/questions-for-judge-sotomayor-on-the-use-of-foreign-and-international-law#_ftn12).

532. Posner & Sunstein, *supra* note 71, at 179. Or, as Waldron says, "The *ius gentium* consensus was derived from these principles' having become established in practice and on the ground as actual legal arrangements all over the known civilized world." WALDRON, *supra* note 75, at 47.

533. WALDRON, *supra* note 75, at 20.

534. Steven G. Calabresi & Nicholas Terrell, *The Fatally Flawed Theory of the Unbundled Executive*, 93 MINN. L. REV. 1696, 1705 (2009).

535. *Id.*

536. THOMAS SOWELL, *KNOWLEDGE AND DECISIONS* 7 (1980).

537. *Id.*

538. *Id.*

homes are constructed, or the “mechanical and electrical principals” by which our electronic devices work, which we “neither understand[] theoretically nor can cope with as a practical matter.”⁵³⁹ Our frequent “complaints and scandals about appliance, automobile, and other repair services testify,” Sowell asserts, to our “utter lack of knowledge of the everyday apparatus on which [we] depend[].”⁵⁴⁰ In contrast, primitive humans had to understand “the production and use of spears, grass huts, . . . which berries are poisonous, which snakes dangerous, or the ways and means of coexistence in the same jungle with lions, tigers, and gorillas.”⁵⁴¹ As Sowell makes clear, modern individuals have less general knowledge but more specialized, complex knowledge than their ancestors.⁵⁴²

Modern individuals, Sowell intuitively, have farmed out the task of acquiring certain specific bits of knowledge to others.⁵⁴³ Specialization minimizes “[t]he time and effort (including costly mistakes) necessary to acquire knowledge . . . through drastic limitations on the amount of duplication of knowledge among the members of society.”⁵⁴⁴ Today, a “relative handful of civilized people know how to produce food, a different handful how to produce clothing, medicine, electronics, houses, etc.”⁵⁴⁵ Accordingly, “[t]he huge costs saved by not having to duplicate given knowledge and experience widely through the population makes possible the higher development of that knowledge among the various subsets of people in the respective specialties.”⁵⁴⁶

In order to understand how decisions are made, Sowell says, it is necessary to first understand “decision-making units,” the “various combinations of individuals repeatedly and habitually mak[ing] certain classes of decisions.”⁵⁴⁷ Though we often ascribe various decisions to “society,” the fact is “[t]here is no one named ‘society’ who decides anything.”⁵⁴⁸ Decisions are made by smaller groups,⁵⁴⁹ “which may range from a married couple to a police department to a

539. *Id.*

540. *Id.*

541. *Id.*

542. *Id.* at 6-8.

543. *Id.* at 7.

544. *Id.* at 7-8.

545. *Id.* at 8.

546. *Id.*

547. *Id.* at 11 (emphasis omitted).

548. *Id.* at 12.

549. *Id.* at 11-12.

national government.”⁵⁵⁰ Decision-making units, Sowell says, “are highly diverse” and are characterized by “the specific, respective sets of constraints and incentives within which each operates.”⁵⁵¹

“Constitutionalism . . . in effect acknowledge[s] and underscore[s]” the “substantial advantages and disadvantages” to different decision-making units and “decision-making relationships, institutionally coexisting within even the most monolithic societies.”⁵⁵² Accordingly,

[c]onstitutional political and legal systems attempt to limit their own scope to areas in which they have a relative advantage as decision-making processes, leaving other areas to other decision-making processes, whose advantages may be either in the quality of the decisions or in the personal dignity implied by free choice.⁵⁵³

They do not attempt to define the legal particulars of “other areas in which the discretion and flexibility of individual choice[s] and interpersonal negotiation may achieve whatever arrangements are deemed mutually satisfactory by the individuals concerned.”⁵⁵⁴ Some constitutional provisions are structured as “determinate rules”;⁵⁵⁵ for example, the requirements that the President be at least thirty-five years old.⁵⁵⁶ In contrast, under the Tenth Amendment, “[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”⁵⁵⁷ We posit that the discretion provided by the Tenth Amendment to states capitalizes on “the persistence of knowledge advantages by . . . subordinate units”—i.e., states—which are more “immediately in daily contact with the relevant facts [and] can much more easily and more cheaply synthesize the knowledge and draw inferences.”⁵⁵⁸ The whole Constitution itself is remarkable for its brevity. The original unamended document, including signatures, is only 4,543 words long.⁵⁵⁹

The *ius gentium* lowers the cost of attaining information by relying on disparate pieces of knowledge that have been aggregated

550. *Id.* at 11.

551. *Id.* at 21.

552. *Id.*

553. *Id.* at 36.

554. *Id.*

555. BALKIN, *supra* note 429, at 6.

556. *Id.*; U.S. CONST. art. II, § 1, cl. 5.

557. U.S. CONST. amend. X.

558. SOWELL, *supra* note 536, at 13.

559. *See generally* U.S. CONST.

from a multitude of sources.⁵⁶⁰ Although individual societies know far more than individual people do, we argue that there may still be conditions under which nations can profit from the “knowledge” found in the experiences of other nations. We believe the *ius gentium* may allow courts to effectively outsource the task of acquiring knowledge to foreign judiciaries for less than the cost of acquiring that information themselves. By expanding the scope of knowledge American courts may take into account when deliberating over decisions, the *ius gentium* may reduce the cost to the American legal system of acquiring knowledge.

“Courts which devote the time and effort required to reach the highest possible standard of judicial decisions,” Sowell writes, “can develop a backlog of cases.”⁵⁶¹ Sowell says this with respect to “minor cases,”⁵⁶² but it seems to be true of major decisions as well. The judicial search for information that may bear on a trial’s outcome is a difficult and unending undertaking that involves costs of its own; Sowell writes that “[l]ofty intellectual standards, rigidly adhered to, may mean rejection of evidence and methods of analysis which would give us valuable clues to complex social phenomena—leaving us instead to make policy decisions in ignorance or by guess or emotion.”⁵⁶³ We believe that the consideration of relevant information from foreign legal sources may in some circumstances, where the constitutional text permits it, facilitate the attainment of just outcomes. Strict adherence to judicial nativism—rejecting useful knowledge that pertains to a particular domestic legal query simply because it is of foreign origin—could force American courts to make judicial decisions in part on the basis of ignorance because they lack all relevant information.

We feel that basing decisions on greater quantities of knowledge contained in the *ius gentium*, acquired at little cost, is more efficient than limiting ourselves to examining only the subset of that total knowledge found only in American sources of law, and

560. Sowell might say that the “intellectual advantage” of the *ius gentium* “is not necessarily that each civilized [society] . . . has more knowledge but that [each] . . . requires far less.” SOWELL, *supra* note 536, at 7. It “is an enormous device for economizing on knowledge. The time and effort (including costly mistakes) necessary to acquire knowledge are minimized through specialization, which is to say through drastic limitations on the amount of duplication of knowledge among . . . members of [the global] society” of nations. *Id.* at 7-8.

561. *Id.* at 81.

562. *Id.*

563. *Id.*

ought to produce better legal outcomes. When the cost of legal information is reduced and courts have a wider base of knowledge on which to reach judgments, they ought to produce wiser decisions. Applying Sowell's framework to the *ius gentium*, we think that when foreign legal decisions are readily available to provide useful and instructive knowledge to domestic courts, we can achieve "drastic limitations on the amount of duplication of knowledge among the members" of the international community.⁵⁶⁴

Sowell notes that "decision-making units" also differ in terms of the "authentication processes and . . . feedback mechanisms," which allow us "to modify decisions already made."⁵⁶⁵ In economic systems, consumer behavior can provide "incremental" feedback, as Sowell says, "[t]he consumer, by choosing among firms to patronize, implicitly weighs the effectiveness of different sets of workers and managers, rewarding some with fuller, more sustained employment, and forcing others to work less or not at all . . . for lack of consumer demand can force the institution itself out of business."⁵⁶⁶

"[E]conomic transactions often involve repeated satisfaction of the same desires," Sowell observes; therefore, "there is continual feedback from those most knowledgeable about the extent to which a given product or service is satisfactory—namely, the consumers."⁵⁶⁷ The judicial system, we would argue, is itself one gigantic "knowledge process, based on estimation and feedback,"⁵⁶⁸ for reexamining the law. In this respect as well, we feel that the *ius gentium* may also be beneficial, for it might improve the overall efficiency of the feedback process. The inclusion of information on the effects of alternative legal rules, and of specific legal rules in certain contexts, into decision-making deliberations could optimize the fit and quality of the legal outcomes that the judicial feedback process produces.

B. Limits on the Hayekian Approach

Obviously, the *ius gentium* will not illuminate the meaning of the text of the U.S. Constitution in all or even in most circumstances. There are common controversies that sovereign nations settle very differently from one another, so that it is not clear that any sort of

564. *Id.* at 7.

565. *Id.* at 17.

566. *Id.* at 34.

567. *Id.* at 35.

568. *Id.* at 70.

international consensus has emerged, and indeed, the issue may just not be the sort of issue that lends itself to consensus. But when the bulk of nations does favor one approach over another, it is at least worth asking the question, why this way? In free markets, the best products—those that are the cheapest, most efficient, and best able to satisfy consumers' demands—tend to win out over inferior products, which die out altogether if few people find them attractive. Why should the same principle not apply to judge-made law as well where the Constitution uses language that is ambiguous?

Let us go back briefly to Coase's theory of the firm.⁵⁶⁹ Essentially, Coase argues that the cost of coordinating resources using the market is sometimes so high that it outweighs the benefits of doing so, so that "certain marketing costs are saved."⁵⁷⁰ When this is so, "forming an organisation and allowing some authority . . . to direct the resources" makes more sense.⁵⁷¹ One can make an analogy between Coase's theory of the firm and Waldron's *ius gentium*. There are many areas of a country's law where the cost of coordinating through the global marketplace of legal ideas may "cost something"—such as the ability to account for various "tastes, conditions, and preferences";⁵⁷² promote international "competition" for "the optimal governmental bundle of public goods";⁵⁷³ or "lower monitoring costs"⁵⁷⁴—or where the benefits may be too low. For example, our tripartite structure of government, with separation of powers, checks and balances, and multiple levels of federalism, would not be something we would wish to alter or abolish even if most other nations followed the Westminster system—we might find that the cost of such a change would be too high.

Likewise, it might not make sense for us to drive on the left side of the road even if most other nations did; Suri Ratnapala notes that people drive on the left side of the road in Australia and on the right in the United States, "[y]et each law is valid within its own sphere of operation."⁵⁷⁵ He says that "the laws of one nation may contradict laws of another nation without invalidating them."⁵⁷⁶ We would add that this is so in part because the paltry benefits of

569. See generally Coase, *supra* note 125.

570. *Id.* at 392.

571. *Id.*

572. Calabresi & Terrell, *supra* note 160, at 32.

573. *Id.* at 34.

574. *Id.* at 32.

575. SURI RATNAPALA, JURISPRUDENCE 93 (2d ed. 2013).

576. *Id.*

adopting a uniform rule for driving do not seem to be worth it. Likewise, it might not be worth it to replace our adversarial legal system of procedure even though many other sovereign nations have inquisitorial systems of procedure—not necessarily because the costs are exceedingly high, but because the benefits such changes would bring seem quite low. Certainly, there is more coordination that a nation must perform internally through its own legal system than a typical firm does through its structure.

With this qualification in place, however, we believe that there are times when a country, like a firm, can benefit from coordinating certain activities through an external spontaneous order, especially when the question is one of “general knowledge” rather than “specific knowledge.”⁵⁷⁷ Sowell notes that most people cannot produce food, clothing, electronics, medicine, or houses on their own;⁵⁷⁸ we believe that likewise, no country on its own possesses enough knowledge of the different choices available when a legal question is posed to a court and the consequences thereof, legal and practical. When facing a matter that has never been raised in an American court before but has been raised elsewhere, we think there will be times when an American judge cannot just look to his own country’s court decisions for guidance, for there just may not be enough information available to make any sort of informed choice.

In these circumstances, as Justice Breyer has explained, an American judge might learn something about a certain issue by considering how “a judge, though of a different country, has had to consider a similar problem” to the one before him.⁵⁷⁹ Even though the foreign judge’s reasoning will not be binding on the American judge, Justice Breyer reasons, the American judge may still “learn something.”⁵⁸⁰ Another way to think of this is that such a judge would be drawing on the spontaneous order of the *ius gentium* to coordinate an action that the planned order of the U.S. legal system is on its own incapable of performing well. Sowell notes that in a “civilization,” individuals can rely on others for knowledge they do not themselves have, such as that which pertains to the “technical, economic, and political intricacies” through which his home is

577. SOWELL, *supra* note 536, at 13.

578. *Id.* at 8.

579. Dorsen, *supra* note 137, at 523 (quoting Justice Stephen Breyer). Justice Breyer: “If I have a difficult case and a human being called a judge, though of a different country, has had to consider a similar problem, why should I not read what that judge has said? It will not bind me, but I may learn something.” *Id.*

580. *Id.* (quoting Justice Breyer).

built.⁵⁸¹ We would extend Sowell's point further and argue that by borrowing the knowledge of those with different experiences from ours, experiences that may be relevant to our own current situation and therefore useful to know, we use the external spontaneous order to take advantage of knowledge that we do not currently possess ourselves. We think that sovereign nation states may benefit from using the *ius gentium* to coordinate certain actions, just as "[o]utside the firm, price movements direct production, which is co-ordinated through a series of exchange transactions on the market."⁵⁸² We believe that at least at some level, there may indeed be what Waldron calls "a body of law emerging from legal systems in general"⁵⁸³ and that it may in some respects be a spontaneous order of rules. Waldron's theory would be greatly strengthened by taking this Hayekian argument into account.

Of course, Justice Breyer acknowledges that even where a foreign court grapples with "'a legal problem, often similar to problems that arise here,'" he believes "'that the decisions of foreign courts do not bind American courts.'"⁵⁸⁴ Justice Breyer, while debating the appropriateness of learning relevant information from a foreign judge about an analogous case with a U.S. Congressman, was allegedly told, "'Fine. You are right. Read it. Just don't cite it in your opinion.'"⁵⁸⁵ If looking to sources of foreign law is valuable because they may contain useful information that may help us resolve what Justice Breyer says are "'difficult questions without obvious answers, where much is to be said on both sides of the issue,'"⁵⁸⁶ it seems to us that this information—whether it be fact, logical deduction, or something else—also exists independently of the actual foreign court decision in which it is invoked, such that the decision itself needn't be cited. This seems to have been the Congressman's point.⁵⁸⁷ Perhaps it is acceptable for American courts to look to the decisions of foreign courts but not cite them directly; maybe American courts should instead simply rely on the same strength of reasoning that those courts use. This is an attractive proposition to us, since it would require domestic legal judgments to stand or fall on the basis of their own inherent strength and reasonableness

581. SOWELL, *supra* note 536, at 7.

582. Coase, *supra* note 125, at 388.

583. WALDRON, *supra* note 75, at 67.

584. Dorsen, *supra* note 137, at 523 (quoting Justice Stephen Breyer).

585. *Id.*

586. *Id.* (quoting Justice Stephen Breyer).

587. *See id.*

without relying on the borrowed credibility of a foreign court like a crutch. Ultimately, however, we think it is a good idea for domestic courts “to be open about the reasons they use,” as Waldron says, because having “transparent citation of reasons for arriving at a decision is one of the most important aspects of adjudication—not least because it enables counsel appearing before a court to know what sort of arguments they should make.”⁵⁸⁸ We strongly agree that courts should be honest about the reasons they use to arrive at the conclusions they reach. If U.S. courts can, and ought to, cite Blackstone⁵⁸⁹ and legal academics,⁵⁹⁰ neither of which have “democratic provenance,” according to Justice Breyer,⁵⁹¹ or “treatises”⁵⁹² and “law review articles,”⁵⁹³ both of which Justice Breyer reads,⁵⁹⁴ it is hard to see why citing the *ius gentium* is more objectionable.

We also would say that Sowell’s theory also cautions against some possible negative implications of the validity of the *ius gentium*. There is asymmetry of knowledge between higher- and lower-level decision-making units, Sowell says, in the sense that although “[t]he powers of the higher units may encompass all the powers of the subordinate units, . . . they almost never encompass all the knowledge.”⁵⁹⁵ Higher-level decision-making units will often lack knowledge that lower-level units possess, Sowell says, because there may be “a prohibitive cost to the higher unit of independently acquiring the same knowledge . . . there are *differences* in their respective costs of acquiring knowledge . . . which vary according to the *kind* of knowledge in question.”⁵⁹⁶

Higher-level units, Sowell says, have a “cost advantage” with respect to the acquisition of “[g]eneral knowledge,” such as “expertise[or] statistics”—knowledge that is broadly applicable in a variety of settings and conditions, because they can draw from a

588. WALDRON, *supra* note 75, at 83.

589. See Dorsen, *supra* note 137, at 541.

590. See *id.* Sowell gives the following example: “[A] decision-making unit which encompasses five subordinate units can acquire a given expertise and statistical data which it applies to all five units, whereas if each unit had independently acquired the same expertise or statistical data it would have cost five times as much altogether.” SOWELL, *supra* note 536, at 13.

591. Dorsen, *supra* note 137, at 541.

592. *Id.*

593. *Id.*

594. *Id.*

595. SOWELL, *supra* note 536, at 13.

596. *Id.*

broader pool of information.⁵⁹⁷ However, subordinate decision-making units have a comparative cost advantage regarding the acquisition of “*specific knowledge*”—information on “the local life style, the reliability of particular suppliers, [or] the level of skill of a given executive”—because they are “in daily contact with the relevant facts[, they] can much more easily and more cheaply synthesize the knowledge and draw inferences.”⁵⁹⁸ Sowell says that

most decisions involve *mixtures* of the two kinds of knowledge, so that the net advantages of the larger and smaller units vary with the kind of decision, and [that] the effectiveness of hierarchical subordination varies with the extent to which the subordinate unit has knowledge advantages over the higher unit.⁵⁹⁹

For example, Sowell says, agricultural production relies to a great extent on specific knowledge—about the characteristics of particular plot of land, local weather, and specific crops—that changes from season to season or even more often.⁶⁰⁰ Sowell’s contrasting example is steel manufacturing, which he says is more amenable to central planning because the knowledge that is required—the proper combinations of ore and coal at certain temperatures—is far more general.⁶⁰¹

Many questions that courts address depend on highly context-specific information where knowledge gleaned from foreign judgments may not be useful.⁶⁰² If a domestic court is hearing a case whose circumstances are distinctly American, we are concerned that the introduction of foreign legal materials may be counterproductive, leading it to draw inappropriate legal conclusions. Of course, circumstances in which very general, rather than specific, legal knowledge is dispositive to a particular domestic legal outcome may on the other hand require that efficient decision-making pay heed to a global, cross-border judicial order, because the international legal community faces lower costs in collecting extensive general knowledge. When this is so, we believe we may benefit from the adoption and application of foreign decisions in our courts.⁶⁰³ However, we suspect that courts will usually need more specific, rather than more general, information. When this is true, the *ius*

597. *Id.*

598. *Id.*

599. *Id.*

600. *Id.* at 14.

601. *Id.*

602. Sowell’s “*specific knowledge*.” *Id.* at 13.

603. For reasons Sowell describes at *id.*

gentium may result in an overreliance by domestic judges on general information from foreign legal sources rather than more relevant local, specific information.

Second, more information does not necessarily translate into more knowledge. Sowell distinguishes between “ideas,” or “raw information,” and “knowledge,” or ideas that have been “authenticated.”⁶⁰⁴ Like physical matter, which consists of “mostly empty space,” Sowell says that “specks of knowledge are scattered through a vast emptiness of ignorance.”⁶⁰⁵ Yet just as these microscopic “specks of matter . . . have such incredible density and weight, and are linked to one another by such powerful forces” that they produce the properties of physical substances, discrete pieces of genuine knowledge can also be “powerfully linked and coordinated.”⁶⁰⁶

However, the “superabundance” of ideas “makes the production of knowledge more difficult rather than easier.”⁶⁰⁷ A large number of ideas, Sowell says, “will have to be discarded somewhere in the process of producing authenticated knowledge.”⁶⁰⁸ Sowell’s process of authentication filters out “facts”⁶⁰⁹ from “visions,”⁶¹⁰ “theories,”⁶¹¹ “myths,”⁶¹² “illusions,”⁶¹³ and “falsehoods.”⁶¹⁴ Given the variety of types of information, “[a]uthentication is as important as the raw information itself.”⁶¹⁵ Sometimes the unavailability of a proper authentication process can make it difficult to distinguish valuable facts from rubbish; an example Sowell provides is the inability of the War Department to anticipate the Pearl Harbor attack despite “knowledge of the impending attack.”⁶¹⁶ Sometimes lack of authentication can be dangerous, Sowell says, such as when a flock of geese picked up on an “American warning system to detect incoming nuclear missiles . . . could have ended in World War III.”⁶¹⁷

604. *Id.* at 4.

605. *Id.*

606. *Id.*

607. *Id.*

608. *Id.*

609. *Id.* at 5.

610. *Id.* at 4.

611. *Id.*

612. *Id.* at 5.

613. *Id.*

614. *Id.*

615. *Id.* at 4.

616. *Id.*

617. *Id.*

By giving judges access to the whole of human legal thought across all nations, the *ius gentium* may blur the lines between relevant knowledge and irrelevant information, swamping the capacities of judges to differentiate the two. When there is so much information available, it can in our opinion become more difficult to tell what is important and what is not. The *ius gentium* aspires to allow judges to use “such information as is available in the world to inform these unavoidable speculations.”⁶¹⁸ If judges lack the ability to distinguish the “specks of knowledge” from the “vast emptiness of ignorance,”⁶¹⁹ we worry that the *ius gentium* may lead to worse judicial outcomes.

Finally, the *ius gentium* presents a problem of democratic responsiveness: Foreign sources of law are obviously much less responsive to the will of U.S. citizens than American law. Self-determination in governance is the hallmark of a free and sovereign people; American legislatures, including Congress, are accountable to voters. For this reason, we would expect that American laws tend to reflect the policy preferences of American citizens. We feel that the problem of democratic responsiveness with respect to the *ius gentium* is twofold. Sowell worries that “the size of government affects the ability of the citizens to monitor what it does.”⁶²⁰ We similarly worry that expanding the scope of materials that courts may consider raises the costs to citizens of monitoring what the courts do. When courts have more sources of information at their disposal that are unfamiliar to our own customs and traditions, it becomes harder for observers to understand precisely what they are doing.

Second, the use of foreign legal materials reduces the responsiveness of the courts to public opinion by making judicial decisions dependent on laws in which Americans have no say in creating. Though Americans determine the substantive content of our law through the electoral process, we have no control over foreign law. Sowell is concerned that “[e]ven within democratic nations, the locus of decision making has drifted away from the individual, the family, and voluntary associations of various sorts, and toward government.”⁶²¹ And even within governments, he says, “it has moved away from elected officials subject to voter feedback, and toward more insulated governmental institutions, such as bureaucracies and the appointed judiciary.”⁶²² We recognize the

618. WALDRON, *supra* note 75, at 92.

619. SOWELL, *supra* note 536, at 4.

620. *Id.* at 317-18.

621. *Id.* at 164.

622. *Id.*

legitimacy of the fear that just as the centralization of official power in administrative agencies and the judiciary may reduce the democratic responsiveness of government to citizen opinions,⁶²³ expanding the role of foreign legal materials, for which no American has voted, in our own judicial process could further reduce the institutional responsiveness of courts to democratic opinion.

IV. PRIVATE KNOWLEDGE AND THE WISDOM OF CROWDS

Waldron rightly mentions “the accumulated wisdom of the world” as an argument in favor of consulting the *ius gentium*,⁶²⁴ an idea we touched upon briefly before but will now explore in greater depth. We believe that “the wisdom of crowds”⁶²⁵ is one possible justification for the reliance on the law of foreign sovereign nation states by American courts as part of the *ius gentium*.⁶²⁶ What we are talking about is the idea “that many minds and many bases for perception are better than a few and that consideration of the ‘wisdom of the multitude’ provides a good justification” for some kinds of decisions.⁶²⁷ As Aristotle wrote,

For the many, who are not as individuals excellent men, nevertheless can, when they have come together, be better than the few best people, not individually but collectively, just as feasts to which many contribute are better than feasts provided at one person’s expense. For being many, each of them can have some part of virtue and practical wisdom, and when they come together, the multitude is just like a single human being, with many feet, hands, and senses, and so too for their character traits and wisdom. That is why the many are better judges of works of music and of the poets. For one of them judges one part, another another, and all of them the whole thing.⁶²⁸

Aristotle was not talking about the citation of foreign law here, but like Waldron,⁶²⁹ we see relevance in Aristotle’s argument that a multitude of experiences with regard to a decision at hand may be helpful to charting a correct course of action.

623. *Id.*

624. WALDRON, *supra* note 75, at 42.

625. SUROWIECKI, *supra* note 115, at 11.

626. *See* WALDRON, *supra* note 75, at 85-89. Waldron touches upon this subject briefly (although we think there is more to be said on this subject) in Chapter Four, in the section called “Outcomes or Holdings? The Force of Numbers.” *Id.*

627. *Id.* at 87. Here, Waldron is paraphrasing Aristotle’s argument in book 3 of the *Politics*. *See* ARISTOTLE, *THE POLITICS* bk. III, at 83 (C.D.C. Reeve trans., Hackett Publishing Co. 1998) (c. 384 B.C.E.).

628. ARISTOTLE, *supra* note 627, at 83.

629. WALDRON, *supra* note 75, at 87.

From this, Waldron has derived the following proposition: “The people acting as a body are capable of making better decisions, by pooling their knowledge, experience, and insight, than any individual member of the body, however excellent, is capable of making on his own.”⁶³⁰ As Waldron notes, this claim is actually more modest than Aristotle’s initial supposition, since it argues for the many against the monarch and not for the many against the aristocracy, a more difficult argument given the possibility for crowd wisdom to apply to the aristocracy’s decisions as well.⁶³¹ Waldron restates it, however, as follows: “The people acting as a body are capable of making better decisions, by pooling their knowledge, experience, and insight, than any subset of them acting as a body and pooling the knowledge, experience, and insight of the members of the subset.”⁶³²

The justification for this argument goes beyond merely the virtue of variety. After all, as Waldron points out, a potluck dinner may not always be better than a carefully planned one.⁶³³ In any case, this metaphor seems a little trite as a defense for the broader point that groups are likely to make wiser decisions than any given subsets of their members.⁶³⁴ But as Waldron points out, Aristotle makes another analogy that does strike closer to the core of the case for the wisdom of the multitude: “[T]he many are better judges than a single man of music and poetry; for some understand one part, and some another, and among them they understand the whole.”⁶³⁵ Many circumstances that require the making of a decision are of a “multifaceted character,” Waldron says, “and no one man, however wise, can be trusted to notice” every aspect of the situation.⁶³⁶ “This is obvious enough in the case of policy decisions,” Waldron says, such as whether to go to war—

[O]ne citizen may be familiar with the Sicilian coastline; another with the military capacities of the Sicilians; a third with the cost and difficulty of naval expeditions; a fourth with the bitterness of military failure; a fifth

630. Jeremy Waldron, *The Wisdom of the Multitude: Some Reflections on Book 3, Chapter 11 of Aristotle’s Politics*, 23 POL. THEORY 563, 564 (1995).

631. *Id.*

632. *Id.* at 565.

633. *Id.* at 567.

634. Waldron discusses the Aristotelian argument for the *ius gentium* at WALDRON, *supra* note 75, at 87-88, and more broadly in Waldron, *supra* note 630.

635. Waldron, *supra* note 630, at 567 (quoting ARISTOTLE, THE POLITICS bk. III, at 66 (Benjamin Jowett trans., Cambridge Univ. Press 1988) (c. 384 B.C.E.)).

636. *Id.*

with the dangers to a democratic state of successful military conquest; and so on.⁶³⁷

More interestingly, Waldron notes that this logic applies to ethical concerns as well, such as to judgments based on equity.⁶³⁸ When a public policy is proposed, a “merchant may not realize how much some measure he is initially inclined to support may prejudice the situation of a farmer until he hears it from the farmer’s own mouth.”⁶³⁹ When large groups deliberate over policy choices, Waldron suggests, they might discover “how each person’s well-being may be affected by the matter under consideration.”⁶⁴⁰ Perhaps if Waldron’s merchant learns that a policy he had been inclined to favor will have a deleterious impact on the farmer, he may be less inclined to support it.⁶⁴¹ Waldron’s implication is that through deliberation, participants are able to do more than just voice their perspectives; as they do so, they can also shape and alter the views of their peers.⁶⁴²

The label that is “traditionally used for the doctrine—’the summation argument’” implies that deliberation consists merely of the mechanical “*aggregation* of what each person brings to the argument,”⁶⁴³ the already fully formed experiences and ideas that each person brings to the table. However, this is too simple—according to Waldron,

[D]eliberation among the many is a way of bringing each citizen’s ethical views and insights . . . to bear on the views and insights of each of the others, so that they cast light on each other, providing a basis for reciprocal questioning and criticism, and enabling a position to emerge which is better than any of the inputs and much more than an aggregation or function of those inputs.⁶⁴⁴

Waldron seems to be saying, in other words, that the value of deliberation is that it enables individuals to alter their views in light of new information shared by others.⁶⁴⁵ To paraphrase him a bit, what emerges from this process are new, organic, hybrid ideas that draw

637. *Id.*

638. *Id.* at 567-68.

639. *Id.* at 568.

640. *Id.*

641. *Id.*

642. *See id.*

643. *Id.* at 569.

644. *Id.* at 569-70.

645. *See id.*

on the combined wisdom of all deliberative participants and are greater than the sum of their parts.⁶⁴⁶

An important implication of Waldron's summation argument, which he points out, is that if one connects it to a "forward-looking view of merit," we see that "merit [is] not a backward-looking concept," nor is it "necessarily an individualized concept."⁶⁴⁷ What this means, he says, is that the doctrine of the wisdom of the multitude holds even when new participants in the deliberative process are not particularly wise.⁶⁴⁸ Waldron offers the following hypothetical:

Take two individuals, Brown and Jones, the former a man of modest virtue and pedestrian judgment, the latter a man of excellence so far as the political virtues are concerned. Considered in terms of their respective individual abilities, Jones merits higher office than Brown; perhaps Brown considered by himself does not merit any office at all. But . . . [a] group including Brown along with Jones may be collectively wiser than Jones himself or any group comprising only Jones and his peers. It will of course almost certainly be true that a citizen body which included Jones but not Brown [] would be collectively wiser than a citizen body that included Brown but not Jones []. However, if [the group including only Jones] is collectively inferior in wisdom to a body that includes both of them [], then the difference in merit between Jones and Brown . . . may be of limited relevance so far as political office is concerned. A person's merit is a matter of the collective political capacity of a group of which he might be a member.⁶⁴⁹

Of course, the principle here articulated may allow for the possibility that the best outcome may be achieved by "accord[ing] greater weight to the votes of people like Jones."⁶⁵⁰ But on the other hand, the best possible answer may also be achieved by aggregating their individual judgments together "only in the light of a deliberative procedure that treats the two of them formally as equals."⁶⁵¹ We will soon discuss some of the conditions under which large groups are likelier to reach wise conclusions.⁶⁵² However, what is important at the moment is that a decision-making group will be wiser with Brown's participation even if he is not as wise as others in the group.⁶⁵³

646. *See id.*

647. *Id.* at 572.

648. *Id.* at 572-73.

649. *Id.*

650. *Id.*

651. *Id.* at 573.

652. *See infra* Sections IV.A-B; SUROWIECKI, *supra* note 115, at 10.

653. Waldron, *supra* note 630, at 573.

This principle may explain why consulting and citing the *ius gentium* without being bound by it may lead to wiser judicial outcomes regardless of whether, or the degree to which, relevant foreign legal decisions are wise.⁶⁵⁴ As judges have more “available information, experience, and insight”⁶⁵⁵ on which to draw, we think the likelihood that they can “synthesiz[e] that reasoning into a superior position for ourselves”⁶⁵⁶ grows. A judge who is limited to consulting only the set of legal materials native to his own country will have less knowledge upon which to draw than one who can consult the entire worldwide body of legal knowledge.⁶⁵⁷ In the worst case scenario, an American court will be no worse off for having considered the judgment of a foreign court, even if that judgment ultimately turns out to be of little value.⁶⁵⁸ A capable American judge, exercising the sort of proper discretion that all good judges necessarily develop, will know when to discard foreign legal judgments as irrelevant and when to allow them to weigh upon his consideration. In those cases where legal materials from a foreign country prove especially applicable and insightful, however, he “may learn something from an array of . . . judiciaries when their accumulated experience is taken into account.”⁶⁵⁹

In Waldron’s mind, for the “summation argument” to mean more than simply adding up the knowledge of several individuals, speech and rhetoric must play an important role in the deliberative process.⁶⁶⁰ Conversation is significant in the process of deliberation because it enables us to “communicate to another experiences and insights that complement those that the other already possesses . . . it enables the group as a whole to attain a degree of wisdom and practical knowledge that surpasses even that of the most excellent individual member.”⁶⁶¹ It is not enough for each person to merely state his knowledge, for we “could be little more than animals” if all that mattered was the “aggregation of expressions of individual

654. See WALDRON, *supra* note 75, at 87-89; Waldron, *supra* note 630, at 572-73.

655. WALDRON, *supra* note 75, at 88.

656. *Id.* at 89.

657. *Id.* at 88-89.

658. Though Waldron acknowledges that there may be some cost in terms of “the difficulty of sifting and synthesizing that material into a reasonable deliberative conclusion.” *Id.* at 88.

659. *Id.*

660. Waldron, *supra* note 630, at 575-77.

661. *Id.* at 577.

utility”;⁶⁶² what matters is the “new synthesis” that emerges when “different views com[e] together in deliberation to contribute dynamically.”⁶⁶³ The open flow of ideas between different parties to a discussion is a central component of what makes larger groups likelier to produce wise decisions than individuals or smaller groups.⁶⁶⁴ Without speech and debate, it is difficult for ideas to be conveyed and received.

One implication of this fact for the citation of the *ius gentium* is that obviously legal judgments cannot “speak” in the way that individuals can, nor can they converse with one another in a literal sense.⁶⁶⁵ If domestic and foreign legal materials can communicate with one another, it must be in a figurative sense. Waldron’s “summation argument,” applied to the *ius gentium*, may mean that the communication between domestic and foreign sources of law occurs primarily in the presiding judge’s mind as he deliberates with himself over the proper course of action to take in a case, using the different legal materials

to bear on the views and insights of each of the others, so that they cast light on each other, providing a basis for reciprocal questioning and criticism, and enabling a position to emerge which is better than any of the inputs and much more than an aggregation or function of those inputs.⁶⁶⁶

As the judge turns over different legal judgments in his mind, we imagine, he metaphorically examines each one in light of the others to piece together a coherent and whole solution for the case at hand.

We argue that it is up to a capable judge to view each source of legal knowledge in light of one another in such a way as to allow them to “converse” with one another, so that the full legal wisdom that is only manifested when disparate legal materials come into concert with one another can be revealed. Fortunately, this is a task for which judges already ought to be well-equipped. Synthesizing different legal materials—precedents, statutes, common law, etc.—constitutes a good deal of the craft of judging. Looking to foreign sources of law would not change the nature of the judge’s task in any fundamental way—it would just give him access to a greater quantity

662. *Id.* at 576.

663. *Id.* at 577.

664. *Id.*

665. *But see generally* ROBERT W. BENNETT, TALKING IT THROUGH: PUZZLES OF AMERICAN DEMOCRACY (2003) (arguing that U.S. courts and governmental institutions are in constant dialogue with one another, and that this is a great strength of our constitutional system).

666. Waldron, *supra* note 630, at 569-70.

of knowledge upon which to draw, and thus improve his likelihood of reaching a wise judgment. It is for this reason that the U.S. Supreme Court regularly consults head counts of the fifty states' laws to see what doctrines prevail in the states and why.⁶⁶⁷

When courts cite the *ius gentium* in good faith, they should not self-servingly "do it one jurisdiction at a time, and . . . justify it . . . one jurisdiction at a time."⁶⁶⁸ This indeed would be, as Justice Scalia has called it, "sophistry."⁶⁶⁹ A "piecemeal,"⁶⁷⁰ pick-and-choose approach—selecting those foreign judgments that support a particular outcome rather than making a contextual and holistic inquiry into the global body of jurisprudence on a subject and appraising the relevance or suitability of individual decisions for comparison to American law—would indeed, as Waldron acknowledges, fail to account for the fact that we "declared . . . independence from Britain 230 years ago"⁶⁷¹ when we cite British law, or that "dismal human rights" abuses have occurred under Robert Mugabe⁶⁷² when we cite the words of "a wise Zimbabwe judge."⁶⁷³ Invoking foreign law, rather, should mean "tak[ing] into consideration the consensus that has emerged among them all."⁶⁷⁴ We agree with Waldron that we should not just cite the law of one country in one case and the law of another country in another.⁶⁷⁵ We are interested in the "consensus in world legal opinion"⁶⁷⁶ on an issue—the "opinion of the world community,"⁶⁷⁷ not just one legal system.

667. See, e.g., *Miller v. Alabama*, 132 S. Ct. 2455, 2459 (2012); *Roper v. Simmons*, 543 U.S. 551, 564-67 (2005); *Loving v. Virginia*, 388 U.S. 1, 6 (1967).

668. WALDRON, *supra* note 75, at 48.

669. *Roper*, 543 U.S. at 627 (Scalia, J., dissenting).

670. WALDRON, *supra* note 75, at 48.

671. *Id.*; Texas Congressman Ted Poe notes that Americans "spilled their blood . . . to sever ties with England forever," and rues that "[n]ow, justices in this land of America . . . use British court decisions . . . in interpreting our Constitution. What the British could not accomplish by force, our Supreme Court has surrendered to them voluntarily." 151 CONG. REC. H3105 (daily ed. May 10, 2005) (statement of Rep. Ted Poe).

672. WALDRON, *supra* note 75, at 48. Gary Bauer notes that "America is a unique nation, with a unique Constitution that has its own history," and asks, "How can we interpret it based on the standards and values of judges in Zimbabwe?" Gary Bauer, *Disorder in Our High Court*, USA TODAY, Mar. 21, 2005, at A23.

673. Dorsen, *supra* note 137, at 529.

674. WALDRON, *supra* note 75, at 48.

675. *Id.*

676. *Id.*

677. *Roper v. Simmons*, 543 U.S. 551, 578 (2005).

A similar phenomenon is famously expressed by Condorcet's Jury Theorem.⁶⁷⁸ Essentially, the Theorem states that "under certain conditions, a widespread belief, accepted by a number of independent actors, is highly likely to be correct."⁶⁷⁹ Therefore, as Eric Posner and Cass Sunstein say, if one is deciding between different options, and a "large majority of states make a certain decision based on a certain shared belief, and the states are well motivated, there is good reason to believe that the decision is correct."⁶⁸⁰ Moreover, "the probability of a correct answer, by a majority of the group, increases toward 100% as the size of the group increases," assuming "that the probability that each voter will answer correctly exceeds 50%, and that these probabilities are independent."⁶⁸¹ According to Posner and Sunstein, Condorcet's Jury Theorem provides a justification, based on a simple mathematical truism, for sometimes looking to the legal judgments of other nations when confronting similar problems because it suggests that foreign judgments sometimes contain important information that American courts should not ignore.⁶⁸²

Posner and Sunstein write that "the decisions of other courts provide relevant information . . . [i]f the high courts of Germany, France, Italy, Spain, and Australia have all decided that the free speech principle includes commercial advertising, there might seem to be reason for the Supreme Court of Ireland to reach the same conclusion."⁶⁸³ Condorcet's Jury Theorem also offers an intellectual "foundation" for individual U.S. states "following the practices of other states,"⁶⁸⁴ which is "a routine and uncontroversial feature of the jurisprudence of state courts."⁶⁸⁵ Posner and Sunstein's idea is that "if

678. See MARQUIS DE CONDORCET, *ESSAI SUR L'APPLICATION DE L'ANALYSE À LA PROBABILITÉ DES DÉCISIONS RENDUES À LA PLURALITÉ DES VOIX* [Essay on the Application of Analysis to the Probability of Majority Decisions] (L'Imprimerie Royale 1785); MARQUIS DE CONDORCET, *ESSAY ON THE APPLICATION OF MATHEMATICS TO THE THEORY OF DECISION-MAKING* (1785), reprinted in CONDORCET: *SELECTED WRITINGS* 33 (Keith Michael Baker ed., 1976); Christian List & Robert E. Goodin, *Epistemic Democracy: Generalizing the Condorcet Jury Theorem*, 9 J. POL. PHIL. 277 (2001); see also ROBERT E. GOODIN, *REFLECTIVE DEMOCRACY* 94-96 (2003); DENNIS C. MUELLER, *PUBLIC CHOICE III*, at 129 (2003).

679. Posner & Sunstein, *supra* note 71, at 131.

680. *Id.*

681. *Id.* at 141.

682. See generally *id.*

683. *Id.* at 140.

684. *Id.* at 136.

685. See, e.g., *id.* at 135; see also *Commonwealth v. Wasson*, 842 S.W.2d 487, 498-99 (Ky. 1992); Vicki C. Jackson, *Constitutional Dialogue and Human*

a majority of states has answered that question a certain way, the court has some reason to believe that the majority view is correct.”⁶⁸⁶ Comparative law, they say, is an ordinary feature of state-court jurisprudence.⁶⁸⁷ Nobody worries that when the one state court cites sister-state judgments, it is allowing “foreign governments . . . to dictate what [its] laws and [its] Constitution mean, and what [its] policies . . . should be,”⁶⁸⁸ or that it “may be slowly losing control over the meaning of [its] laws.”⁶⁸⁹ Yet this is precisely the fear that Texas Senator John Cornyn expressed with respect to the citation of foreign law.⁶⁹⁰

Condorcet’s Jury Theorem does not perfectly express Waldron’s “summation argument,” as Waldron makes clear.⁶⁹¹ For one thing, it assumes that all participants in crowd deliberation have a probability of producing a “correct[]” decision that “exceeds

Dignity: States and Transnational Constitutional Discourse, 65 MONT. L. REV. 15, 19-20 (2004); A. Michael Beaird, *Citations to Authority by the Arkansas Appellate Courts, 1950-2000*, 25 U. ARK. LITTLE ROCK L. REV. 301, 334, 336 (2003); William H. Manz, *The Citation Practices of the New York Court of Appeals: A Millennium Update*, 49 BUFF. L. REV. 1273, 1301 (2001); Joseph A. Custer, *Citation Practices of the Kansas Supreme Court and Kansas Court of Appeals*, 8 KAN. J.L. & PUB. POL’Y 126, 127 (1999); James Leonard, *An Analysis of Citations to Authority in Ohio Appellate Decisions Published in 1990*, 86 LAW LIBR. J. 129, 137-38 (1994); Fritz Snyder, *The Citation Practices of the Montana Supreme Court*, 57 MONT. L. REV. 453, 462 (1996); John Henry Merryman, *Toward a Theory of Citations: An Empirical Study of the Citation Practice of the California Supreme Court in 1950, 1960, and 1970*, 50 S. CAL. L. REV. 381, 389-91 (1977); Richard A. Mann, *The North Carolina Supreme Court 1977: A Statistical Analysis*, 15 WAKE FOREST L. REV. 39, 58 (1979); David Blumberg, *Influence of the Massachusetts Supreme Judicial Court on State High Court Decisionmaking 1982-1997: A Study in Horizontal Federalism*, 61 ALB. L. REV. 1583, 1583 (1998); Lawrence M. Friedman et al., *State Supreme Courts: A Century of Style and Citation*, 33 STAN. L. REV. 773, 796-98 (1981); James N.G. Cauthen, *Horizontal Federalism in the New Judicial Federalism: A Preliminary Look at Citations*, 66 ALB. L. REV. 783, 790 (2003); Patrick Baude, *Interstate Dialogue in State Constitutional Law*, 28 RUTGERS L.J. 835, 838 (1997); Douglas A. Hedin, *The Quicksands of Originalism: Interpreting Minnesota’s Constitutional Past*, 30 WM. MITCHELL L. REV. 241, 256-61 (2003) (discussing out-of-state citations by the Minnesota Supreme Court in interpreting provisions of the Minnesota Constitution derived from out-of-state constitutions).

686. Posner & Sunstein, *supra* note 71, at 142.

687. *Id.* at 135; see also Caldeira, *Legal Precedent*, *supra* note 514, at 52; Caldeira, *State Reputation*, *supra* note 514, at 87-94.

688. 151 CONG. REC. S3109 (daily ed. Mar. 20, 2005) (statement of Sen. Cornyn).

689. Posner & Sunstein, *supra* note 71, at 138.

690. 151 CONG. REC. at S3109.

691. WALDRON, *supra* note 75, at 86-87.

50%.⁶⁹² As Waldron wryly notes, “critics . . . may not accept that foreign courts are, on average, more likely than not to get it right about important constitutional issues.”⁶⁹³ In contrast, Waldron’s “summation argument” holds that the level of wisdom of a group decision increases on average as the group expands, regardless of whether individual participants themselves have “extensive” or “limited insights.”⁶⁹⁴ We think the Brown/Jones example⁶⁹⁵ demonstrates the essential difference between the two paradigms. If Brown is a bad judge—if his probability of reaching a good decision is below 50%—then according to Condorcet’s Jury Theorem, his participation in group deliberation will actually be detrimental to its likelihood of producing a good judgment; as Waldron notes, a decision maker’s better-than-even likelihood of getting the answer right is “a crucial presupposition of Condorcet’s theorem. [I]f it fails, the Condorcet effect goes into reverse.”⁶⁹⁶ Waldron, in contrast, would posit that Brown can still contribute wisdom to group decision-making.⁶⁹⁷ We think that Waldron has the better argument here than Posner and Sunstein—that the level of wisdom embodied in legal judgments of the foreign nation need not be especially high for them to be of value to American judges in helping them understand indeterminate legal provisions.⁶⁹⁸ The point, though, is that Posner and Sunstein are correct in asserting that the likelihood that a group will reach the right decision “increases toward 100% as the size of the group increases,”⁶⁹⁹ and that this principle counsels in favor of reference to sources of foreign law.⁷⁰⁰

James Surowiecki convincingly argues in his popular book, *The Wisdom of Crowds*, that under the proper conditions crowds tend to produce better decisions than their most intelligent individual members so long as those decisions are arrived at independently as happens in Comparative Constitutional Law.⁷⁰¹ A classic example of group intelligence, which Surowiecki notes, is the experiment where participants are asked to guess the number of jellybeans in a jar.⁷⁰²

692. Posner & Sunstein, *supra* note 71, at 141.

693. WALDRON, *supra* note 75, at 86-87.

694. See Waldron, *supra* note 630, at 573.

695. *Id.* at 572-73.

696. WALDRON, *supra* note 75, at 87.

697. Waldron, *supra* note 630, at 573.

698. See *id.*

699. Posner & Sunstein, *supra* note 71, at 141.

700. See *id.* at 143.

701. SUROWIECKI, *supra* note 115, at xiii.

702. *Id.* at 255.

The average guess of the group is consistently more accurate than the overwhelming bulk of individual guesses.⁷⁰³ Anecdotal examples of this phenomenon include the television program *Who Wants To Be A Millionaire*, where when given a multiple-choice question with four possible answers, the audience would pick the right answer 91% of the time, whereas an “expert[]” would only make the right choice around 65% of the time.⁷⁰⁴ Studies conducted by sociologists and psychologists between the 1920s and 1950s demonstrated that the concept of group intelligence stands up to scientific scrutiny.⁷⁰⁵ Waldron would have done well to discuss Surowiecki’s thesis more thoroughly; instead, it is relegated to a single lowly footnote.⁷⁰⁶

Collective wisdom is more than a simple matter of “nose counting”;⁷⁰⁷ it should be invoked where there is consensus, not simply a bare numerical majority.⁷⁰⁸ Justice Kennedy’s reliance on foreign law in *Roper* was criticized by some as being “all about noses, not reasons.”⁷⁰⁹ Collective wisdom also does not mean that individuals will never outperform the group as a whole, Surowiecki notes.⁷¹⁰ Oftentimes, “there will be a few people who do better than the group.”⁷¹¹ However, he says, there is no reason to believe that any specific individuals are likely to “consistently outperform the

703. See *id.*; see also Jack L. Treynor, *Market Efficiency and the Bean Jar Experiment*, 43 FIN. ANALYSTS J. 50, 50 (1987).

704. SUROWIECKI, *supra* note 115, at 4.

705. *Id.* at 4-5. There have been many studies on “group intelligence”; some of the most consequential and illuminating are Richard S. Bruce, *Group Judgments in the Fields of Lifted Weights and Visual Discrimination*, 1 J. PSYCHOL. 117 (1935); Kate Gordon, *Group Judgments in the Field of Lifted Weights*, 7 J. EXPERIMENTAL PSYCHOL. 398 (1924); Herbert Gurnee, *Maze Learning in the Collective Situation*, 3 J. PSYCHOL. 437 (1937); Marjorie E. Shaw, *A Comparison of Individuals and Small Groups in the Rational Solution of Complex Problems*, 44 AM. J. PSYCHOL. 491 (1932).

706. See WALDRON, *supra* note 75, at 241 n.42.

707. *Id.* at 85; see also *Atkins v. Virginia*, 536 U.S. 304, 346 (2002) (Scalia, J., dissenting) (“What we have looked for in the past to ‘evolve’ the Eighth Amendment is a consensus of the same sort as the consensus that adopted the Eighth Amendment: a consensus of the sovereign States that form the Union, not a nose count of Americans for and against.” (emphasis omitted)).

708. WALDRON, *supra* note 75, at 89 (“For my purposes, perhaps its most important implication is to move us away from a nose-counting approach that looks only to the accumul[at]ed outputs . . .”).

709. Young, *supra* note 72, at 152; see also WALDRON, *supra* note 75, at 85; Ganesh Sitaraman, *The Use and Abuse of Foreign Law in Constitutional Interpretation*, 32 HARV. J.L. & PUB. POL’Y 653, 681-82 (2009).

710. SUROWIECKI, *supra* note 115, at 5.

711. *Id.*

group.”⁷¹² This means that “if you run ten different jelly-bean-counting experiments, it’s likely that each time one or two students will outperform the group.”⁷¹³ What matters is that “they will not be the same students each time.”⁷¹⁴

A. Why Crowds Can Sometimes Reach Better Decisions than Individuals

Posner and Sunstein similarly offer several necessary conditions for Condorcet’s Jury Theorem to apply.⁷¹⁵ First, a foreign legal material “must reflect a *judgment* based on that state’s *private information* about how some question is best answered.”⁷¹⁶ Second, the foreign legal material “must address a problem that is similar to the problem before the domestic court.”⁷¹⁷ This refers both to the “facts” and the “legal principles, institutions, and values of the foreign” nation.⁷¹⁸ Most importantly, they say, foreign law “must reflect an *independent* judgment; it must not be a matter of merely following other states.”⁷¹⁹ If a foreign nation is just following another sovereign nation’s judgment, then its courts are participating in a “cascade effect.”⁷²⁰ If these conditions are not met, foreign legal materials are “not analogous to a vote that aggregates information.”⁷²¹ In addition, judges must be able to “interpret foreign [legal] materials both easily and adequately”;⁷²² information from foreign legal judgments must be taken as “relevant information for resolving disputes” without any inherent precedential value;⁷²³ and third, the Court must be straightforward in its explanations for using foreign law and not engaged in “judicial rhetoric.”⁷²⁴

712. *Id.*

713. *Id.*

714. *Id.*

715. See Posner & Sunstein, *supra* note 71, at 143-44.

716. *Id.* at 144.

717. *Id.*

718. *Id.*

719. *Id.*

720. *Id.* at 145 (emphasis omitted); see also *infra* Section IV.B.

721. Posner & Sunstein, *supra* note 71, at 144.

722. *Id.* at 137.

723. *Id.*

724. *Id.*

Surowiecki similarly expresses the belief that wise crowds are distinguished from mobs (which are after all unwise crowds)⁷²⁵ by four important conditions.⁷²⁶ First, for a crowd to be wise it must possess a genuine “diversity of opinion,” so that each person contributes some “private information, even if it’s just an eccentric interpretation of the known facts.”⁷²⁷ Second, for a crowd to be wise it must be decentralized, so that people may “specialize and draw on local knowledge.”⁷²⁸ Third, he says, it is vitally important that individuals’ opinions are determined independently of one another and are not controlled by those of their peers.⁷²⁹ And, fourth, there must be an aggregating “mechanism . . . for turning private judgments into a collective decision.”⁷³⁰ When these conditions are all met, the crowd’s judgment will likely be accurate.⁷³¹

The theory of crowd wisdom assumes that it is critical that group members are allowed to reach their own choices individually and are not forced to adopt a single group position.⁷³² If this element is not in place, the likelihood of the group yielding a superior decision is diminished; crowd wisdom assumes that “our opinions are, in some sense, our own.”⁷³³ Collective wisdom expresses itself in “[d]iversity and independence . . . disagreement and contest, not consensus or compromise.”⁷³⁴

We posit that this is because the process by which groups make decisions is a process of spontaneous order.⁷³⁵ Systems of

725. Cf. SUROWIECKI, *supra* note 115, at 256 (“A market, in other words, turns into a mob.”); *id.* at 257 (“Baiting crowds are, of course, relatively rare. But the dynamic that drives them seems very similar to the behavior of rioting mobs.”).

726. *Id.* at 10.

727. *Id.*

728. *Id.*

729. *Id.*

730. *Id.*

731. *Id.*

732. Cf. *id.* at 10, 41 (“Independence doesn’t mean isolation, but it does mean relative freedom from the influence of others. If we are independent, our opinions are, in some sense, our own. . . . [A] group of people—unlike a colony of ants—is far more likely to come up with a good decision if the people in the group are independent of each other.”).

733. *Id.* at 41.

734. *Id.* at xix.

735. Cf. *id.* at 71-72. Says Surowiecki:

What you’d like is a way for individuals to specialize and to acquire local knowledge—which increases the total amount of information available in the system—while also being able to aggregate that local knowledge and private information into a collective whole To accomplish this, any “crowd”—whether it be a market, a corporation, or an intelligence

spontaneous order are able to absorb more “dispersed knowledge” than can “organization.”⁷³⁶ Surowiecki says that for group decision-making, one basis of collective wisdom is that each member independently contributes his or her own “tacit knowledge,” which he defines as “knowledge that can’t be easily summarized or conveyed to others, because it is specific to a particular place or job or experience,” to the group’s overall deliberations.⁷³⁷ Collective wisdom works when each group member contributes “new information rather than the same old data everyone is already familiar with.”⁷³⁸ Crowds are likelier to reach good decisions when they “are made up of people with diverse perspectives who are able to stay independent of each other.”⁷³⁹ It is for this reason that under some circumstances the group’s “average answer will often be at least as good as the answer of the smartest member.”⁷⁴⁰

Independent decision-making by all participants “is important to intelligent decision making . . . [because] it keeps the mistakes that people make from becoming correlated.”⁷⁴¹ When individuals depend on one another for information, errors can “wreck the group’s collective judgment.”⁷⁴² Independence also ensures that each member contributes new information to the group, Surowiecki says, rather than that one is relying solely on older information.⁷⁴³ Making people

agency—needs to find the right balance between the two imperatives: making individual knowledge globally and collectively useful (as we know it can be), while still allowing it to remain resolutely specific and local.

Id. Says Hayek: “We shall see that it is impossible, not only to replace the spontaneous order by organization and at the same time to utilize as much of the dispersed knowledge of all its members as possible” HAYEK, RULES AND ORDER, *supra* note 111, at 51. Compare SUROWIECKI, *supra* note 115, at 72 (aggregating and utilizing “local knowledge and private information” and turning it “into a collective whole”), with HAYEK, RULES AND ORDER, *supra* note 111, at 51 (emphasizing spontaneous order’s utilization of “dispersed knowledge”).

736. HAYEK, RULES AND ORDER, *supra* note 111, at 51.

737. SUROWIECKI, *supra* note 115, at 71 (noting that Surowiecki borrows the phrase “tacit knowledge” from Hayek).

738. *Id.* at 41.

739. *Id.*

740. *Id.* at 11.

741. *Id.* at 41.

742. *Id.* (“Errors in individual judgment won’t wreck the group’s collective judgment as long as those errors aren’t systematically pointing in the same direction. One of the quickest ways to make people’s judgments systematically biased is to make them dependent on each other for information.”).

743. Surowiecki says that “independent individuals are more likely to have new information rather than the same old data everyone is already familiar with. The

“dependent on each other for information” will “make people’s judgments systematically biased.”⁷⁴⁴ In order to ensure that group members reach their individual decisions separately, Surowiecki says that certain conditions must be in place.⁷⁴⁵ For one, he says, individuals make better decisions when members “pay much less attention to what everyone else is saying.”⁷⁴⁶ Members should also make their decisions “simultaneously (or close to it)” at least “as much as possible.”⁷⁴⁷ A good deal of background planning is also necessary to ensuring that crowds produce wise decisions in addition to merely guaranteeing the independence of individual choices. This may sound strange, since we have spent much time commending spontaneous orders, not planned ones. By *planning*, though, we mean something more specific; there must be “a means of aggregating all those different opinions,” so that “the group’s collective solution . . . [is] smarter than even the smartest person’s solution.”⁷⁴⁸

Likewise, Surowiecki identifies three categories into which collective wisdom problems are likely to fall.⁷⁴⁹ The first covers what he calls “*cognition* problems,” which “have or will have definitive solutions.”⁷⁵⁰ The jellybean experiment is an example of this type of problem because there is, without a doubt, an exact number of jellybeans in the jar. Problems that have no “single right answer, but to which some answers are certainly better than others”—for example, whom one should marry—also fall in this category.⁷⁵¹ The second category is that of “*coordination* problem[s],”⁷⁵² which involve getting “members of a group . . . to coordinate their behavior with each other, knowing that everyone else is trying to do the same”

smartest groups, then, are made up of people with diverse perspectives who are able to stay independent of each other.” *Id.* He cautions that independence does not “imply rationality or impartiality,” but stresses that “as long [as] you’re independent, you won’t make the group any dumber” even if you are “biased and irrational.” *Id.*

744. *Id.*

745. *Id.* at 63-65.

746. *Id.* at 65.

747. *Id.* at 64.

748. *Id.* at 75.

749. *Id.* at xvii-xviii.

750. *Id.* at xvii. Surowiecki says that a cognition problem may not have “a single right answer,” but “some answers are certainly better than others.” *Id.* Other examples of cognition problems that Surowiecki lists include “What would be the best place to build this new public swimming pool?” and “How likely is it that this drug will be approved by the FDA?” *Id.*

751. *See id.*

752. *Id.* at xvii-xviii.

thing.⁷⁵³ The third category involves “cooperation problem[s],” which involve getting individuals who may not trust one another initially “to work together, even when narrow self-interest would seem to dictate that no individual should take part.”⁷⁵⁴ Paying taxes, Surowiecki says, is a cooperation problem.⁷⁵⁵

B. Information Cascades and the Madness of Crowds

But are crowd decisions always wise? Many spontaneous groups are ignorant and poorly organized, more akin to mobs than wise collectives. It seems that crowds sometimes descend into mobs, whose decisions are not wise but are foolish or even dangerous.⁷⁵⁶ Sometimes, “we could become individually smarter but collectively dumber.”⁷⁵⁷ “Men, it has been well said, think in herds,” wrote nineteenth-century journalist Charles Mackay in *Memoirs of Extraordinary Popular Delusions and the Madness of Crowds*; “it will be seen that they go mad in herds, while they only recover their senses slowly, and one by one.”⁷⁵⁸ He feared that “nations . . . like individuals . . . have their whims and their peculiarities; their seasons of excitement and recklessness, when they care not what they do.”⁷⁵⁹ Sometimes, he says, a nation will not “recover[] its senses until it has shed rivers of blood and sowed a harvest of groans and tears, to be reaped by its posterity.”⁷⁶⁰

James Madison had similar misgivings. In *The Federalist No. 55*, Madison says “[h]ad every Athenian citizen been a Socrates,

753. *Id.* at xviii (“Coordination problems require members of a group (market, subway riders, college students looking for a party) to figure out how to coordinate their behavior with each other, knowing that everyone else is trying to do the same.”). Other examples of such problems are “companies organiz[ing] their operations” and “driv[ing] safely in heavy traffic.” *Id.*

754. *Id.* (“As their name suggests, cooperation problems involve the challenge of getting self-interested, distrustful people to work together, even when narrow self-interest would seem to dictate that no individual should take part.”).

755. *Id.* Other examples are “dealing with pollution” and “agreeing on definitions of what counts as reasonable pay.” *Id.*

756. Surowiecki gives an example of a crowd that baited a woman into jumping off a bridge in Seattle in 2001. “‘Get it over with!’ they cried. ‘Just jump, bitch! Just do it!’” *Id.* at 256.

757. *Id.* at 42.

758. CHARLES MACKAY, *MEMOIRS OF EXTRAORDINARY POPULAR DELUSIONS AND THE MADNESS OF CROWDS* 6 (Project Gutenberg 2008) (1852), available at <http://www.cmi-gold-silver.com/pdf/mackaych2451824518-8.pdf>.

759. *Id.*

760. *Id.*

every Athenian assembly would still have been a mob.”⁷⁶¹ The Framers believed in crowd wisdom and democracy, but thought that it must be filtered through multiple layers of institutions, including representation,⁷⁶² bicameralism,⁷⁶³ presidential veto,⁷⁶⁴ and judicial review.⁷⁶⁵ They feared that sudden bursts of popular passion or enthusiasm could erupt and cause great harm—think lynchings in the South, or the mass use of the guillotine during the French Revolution.

Is Mackay and Madison’s pessimistic view of crowd behavior correct? In some circumstances it may be, but not necessarily all the time. Crowds may be likelier to produce unwise decisions when they lack

the four conditions that characterize wise crowds: diversity of opinion (each person should have some private information, even if it’s just an eccentric interpretation of the known facts), independence (people’s opinions are not determined by the opinions of those around them), decentralization (people are able to specialize and draw on local knowledge), and aggregation (some mechanism exists for turning private judgments into a collective decision). If a group satisfies those conditions, its judgment is likely to be accurate.⁷⁶⁶

While Mackay referred to the “Madness of Crowds,”⁷⁶⁷ Surowiecki argues that the failure of crowds to make wise decisions is in fact often the result of what economists call “information cascade[s],”⁷⁶⁸ a phenomenon whose basic idea is that “when individuals see past signals only through a crude discrete filter—for example, whether an action was adopted or rejected—then learning is surprisingly imperfect and can quickly become completely blocked.”⁷⁶⁹

761. THE FEDERALIST NO. 55, at 288 (James Madison) (George W. Carey & James McClellan eds., 2001).

762. *Id.*

763. THE FEDERALIST NO. 51, *supra* note 761, at 269 (James Madison).

764. THE FEDERALIST NO. 73, *supra* note 761, at 380 (Alexander Hamilton).

765. THE FEDERALIST NO. 78, *supra* note 761, at 401-02 (Alexander Hamilton).

766. SUROWIECKI, *supra* note 115, at 10. For a more in-depth discussion of these conditions and their importance to wise (or unwise) decision-making, see *id.* at 40-65.

767. MACKAY, *supra* note 758.

768. SUROWIECKI, *supra* note 115, at 53; see also Sushil Bikhchandani, David Hirshleifer & Ivo Welch, *Learning from the Behavior of Others: Conformity, Fads, and Informational Cascades*, J. ECON. PERSP., Summer 1998, at 151, 154 (using the term “informational cascade,” but the concept is substantively the same).

769. Bikhchandani, Hirshleifer & Welch, *supra* note 768, at 159.

Surowiecki says that “when people’s decisions are not made all at once but rather in sequence,”⁷⁷⁰ there is an information cascade.⁷⁷¹

Information cascades begin when a crowd is faced with a choice.⁷⁷² He presents the following example:

Assume you have a large group of people, all of whom have the choice of going to either a new Indian restaurant or a new Thai place. The Indian restaurant is better (in an objective sense) than the Thai place. And each person in the group is going to receive, at some point, a piece of information about which restaurant is better. But the information is imperfect. Sometimes it will be wrong—that is, it will say the Thai place is better when it’s not—and will guide a person in the wrong direction. So to supplement their own information, people will look at what others are doing.⁷⁷³

The problem, Surowiecki explains, “starts when people’s decisions are not made all at once but rather in sequence, so that some people go to one of the two restaurants first and then everyone else follows in order.”⁷⁷⁴ In his example, some people go to the Thai place, acting on imperfect information.⁷⁷⁵ Under “the cascade model, everyone who follows assumes—even if they’re getting information telling them to go to the Indian restaurant—that there’s a good chance, simply because the Thai place is crowded, that it’s better.”⁷⁷⁶ The end result is that everybody winds up making the wrong choice because the first restaurant-goer received bad information.⁷⁷⁷

Information cascades occur, Surowiecki says, when and because individuals wrongly believe they are learning from the information of others.⁷⁷⁸ At some point, they stop listening to their own private knowledge altogether.⁷⁷⁹ However, he says that once individuals stop relying to some degree on their own knowledge, the cascade is no longer informative; “[i]nstead of aggregating all the information individuals have, the way a market or a voting system

770. SUROWIECKI, *supra* note 115, at 53.

771. *Id.* at 54.

772. *Id.* at 53-54.

773. *Id.* at 53; *see also* Bikhchandani, Hirshleifer & Welch, *supra* note 768, at 152.

774. SUROWIECKI, *supra* note 115, at 53.

775. *Id.*

776. *Id.* at 54.

777. *Id.* at 53-54 (“Remember, the information people have is imperfect. So if the first couple of people happen to get bad information . . . everyone ends up making the wrong decision, simply because the initial diners, by chance, got the wrong information.”).

778. *Id.* at 54.

779. *Id.*

does, the cascade becomes a sequence of uninformed choices, so that collectively the group ends up making a bad decision.”⁷⁸⁰ That is, instead of making decisions independently based on what they know, people make choices based on what they believe their predecessors knew.⁷⁸¹ Often, “a cascade is not the result of mindless trend-following, or conformity, or peer pressure. . . . People fall in line because they [wrongly] believe they’re learning something important from the example of others.”⁷⁸²

According to Surowiecki, “[i]f everyone has the same likelihood of making the right choice, and everyone before you has made the same choice, then you should do what everyone else has done.”⁷⁸³ At this point, he says, “[e]veryone thinks that people are making decisions based on what they know, when in fact people are making decisions based on what they think the people who came before them knew.”⁷⁸⁴ The spontaneous order is no longer aggregating the information that individuals possess; the decision-making process becomes a “sequence of uninformed choices” so that the collective decision the group ends up reaching is a bad one.⁷⁸⁵ Market bubbles and economic crises can be the results of information cascades, Surowiecki says.⁷⁸⁶ To loosely paraphrase Surowiecki, they frequently occur when otherwise-rational individuals overlook what common sense would indicate are warning signs that the market value of an investment no longer seems to be related to what value it possesses in the real world.⁷⁸⁷

Sometimes, Surowiecki says, participants in a bubble ignore their own “doubts” about whether their performance expectations for an investment are unrealistic because “not investing seem[s] tantamount to suicide.”⁷⁸⁸ Only after the bubble collapses do they realize that “the conventional wisdom was seriously questioned and

780. *Id.* at 55.

781. *Id.* at 54-55.

782. *Id.* at 54.

783. *Id.*

784. *Id.* at 54-55.

785. *Id.* at 55 (“Instead of aggregating all the information individuals have, the way a market or a voting system does, the cascade becomes a sequence of uninformed choices, so that collectively the group ends up making a bad decision . . .”).

786. *Id.* at 57. Surowiecki uses the example of the Internet bubble of the late 1990s; a more relevant example today might be the subprime mortgage crisis of the late 2000s that was one of the first indicators of a global financial recession. *See id.*

787. *Id.* at 57-58. Consider Surowiecki’s example of the Internet bubble.

788. *Id.* at 57.

found wanting.”⁷⁸⁹ Information cascades, Posner and Sunstein note, undermine an essential assumption of the application of the theory of crowd wisdom to the citation of foreign law; when a state appears to be “contributing to information about what must be done,” but “is actually [just] following the relevant [legal] judgments of others,”⁷⁹⁰ their judgments are not independent,⁷⁹¹ and thus contribute little, if anything, to the pool of existing information.

Of course, it must be remembered that information cascades are not inevitable. Where the four conditions for collective wisdom Surowiecki lists are met—diversity of opinion, independence, decentralization, and aggregation⁷⁹²—cascades are avoidable. In such cases, crowd madness is less likely and one can hope that groups will make shrewd predictions.

C. Crowd Wisdom and the *Ius Gentium*

The obvious relevance of this to Waldron’s theory is that we would characterize the *ius gentium* as the application of crowd wisdom (or folly) to international law. The worldwide scientific consensus “stands as a repository of enormous value” and serves as a “prescriptive starting point” to scientists seeking to explore natural and social phenomena,⁷⁹³ Waldron says; using his words, we would say that judges should not “try to proceed without drawing on that repository [of legal knowledge] to supplement their own individual research.”⁷⁹⁴ Legal precedents may not always be dispositive, and they may only serve as a starting point, but as Waldron illustrates, it would be absurd for judges to make legal judgments without at least considering the body of existing jurisprudence,⁷⁹⁵ just as, Waldron says, in the public health context “[i]t would be ridiculous to say that because the problem had arisen in the United States, we should look only to American science to solve it—as if to say, ‘We must never

789. *Id.* at 58.

790. Posner & Sunstein, *supra* note 71, at 145.

791. *Id.* at 144-45.

792. SUROWIECKI, *supra* note 115, at 10.

793. WALDRON, *supra* note 75, at 100.

794. *Id.*

795. For example, Waldron says, even if American conditions are different, we would want to “ensure that [we] respond[] rationally to those differences, identifying conditions that called for an approach unlike those tried in other countries and having some detailed sense of how to measure and respond proportionately to [those] differentiating factors.” *Id.* at 102.

forget that this is an American epidemic we are fighting.”⁷⁹⁶ This logic, Waldron argues, applies to foreign sources of law in addition to domestic law.⁷⁹⁷ We argue that Waldron’s *ius gentium* tackles a “*cognition* problem[.]”—which are the best laws and practices out there on which “collective intelligence can be brought to bear”⁷⁹⁸ by serving as a mechanism by which normatively superior laws might be discovered and applied as broadly as possible? We call this a cognition problem because it assumes that some legal approaches “are certainly better than others,” despite there not always being “a single right answer,” and the fact that individuals may disagree over which approaches are “better than others.”⁷⁹⁹ It may be, however, that the *ius gentium* may sometimes be able to address a “*coordination* problem” seeking to harmonize the laws of different nations to produce efficient outcomes,⁸⁰⁰ or “*cooperation* problem[s],” attempting to foster collaboration among nations to achieve a common goal.⁸⁰¹

There is a normative bent to this goal—after all, the determination of which laws are superior to others will necessarily involve value judgments. We propose that such judgments be made through a mechanism, the *ius gentium*, that utilizes the collective wisdom of different sovereign nations. Waldron argues that when “a global consensus” reveals the “prevalence of certain moral attitudes which are quite strikingly different from our own,” then “[t]here is some learning to be done here.”⁸⁰² We agree. Legal norms across different sovereign nations may indicate a rule’s essential goodness, and there may be something to be said for a law if so many disparate cultures have adopted it.

The *ius gentium* could potentially be wise in the way that large crowds are wise. We hope that dozens of constitutional courts spread across the world hearing judicial cases would be more likely to demonstrate wisdom than madness. We hope such courts would

796. *Id.* at 101.

797. *Id.* at 102.

798. SUROWIECKI, *supra* note 115, at xvii.

799. *Id.*

800. *Id.* at xvii-xviii.

801. *Id.* at xviii.

802. WALDRON, *supra* note 75, at 93 (“There is some learning to be done here, if not about moral truth itself, then about the nature and prevalence of certain moral attitudes which are quite strikingly different from our own and about the significance of [that] disparity. Again, the argument is not that we should simply fall into line with a global consensus. But awareness of difference can sometimes be the beginning of wisdom . . .”).

make decisions independently incorporating their own unique legal knowledge. We feel the system of spontaneous order through which the *ius gentium* would work could, in theory, meet all four of Surowiecki's criteria for wise group decision-making.⁸⁰³ It could possess "diversity of opinion,"⁸⁰⁴ for individual constitutional courts would have unique knowledge on the social, cultural, and legal landscape of their countries. Second, the *ius gentium* would be characterized by "decentralization," allowing courts "to specialize and draw on local knowledge."⁸⁰⁵ Third, one could hope that constitutional courts would render their judgments with "independence"⁸⁰⁶ from one another, looking toward each other for guidance on occasion, but leaning mostly on their own private intelligence and knowledge of their own sovereign nation's laws. Finally, the *ius gentium* could, in theory, provide an "aggregation . . . mechanism" for divining the "collective decision" out of each court's "private judgments."⁸⁰⁷ We agree with Waldron that listening to "judges socialized [not only] in America but also . . . socialized elsewhere" should in theory enhance "the range of available information, experience, and insight" that goes into decision-making,⁸⁰⁸ and we think this increases the odds that the global community of jurists will collectively reach "right" decisions.

The argument about the wisdom of crowds relates to Hayek's argument about the general superiority of spontaneous systems of order over planned systems of order, with the former being better able "to utilize as much of the dispersed knowledge of all its members as possible," and the latter being unable "to improve or correct this order by interfering in it by direct commands."⁸⁰⁹ In both cases, what is at issue is the amount of socially dispersed knowledge that is made available to a judicial decision maker. We think a system of spontaneous order is likeliest to produce good outcomes when people's decision-making is characterized by Surowiecki's four conditions: diversity, independence, decentralization, and aggregation.⁸¹⁰ We also think spontaneous systems of order are

803. See SUROWIECKI, *supra* note 115, at 10.

804. *Id.*

805. *Id.*

806. *Id.*

807. *Id.*

808. WALDRON, *supra* note 75, at 88.

809. HAYEK, RULES AND ORDER, *supra* note 111, at 51.

810. This is because we believe they are likelier to be characterized by the conditions Surowiecki lays out. SUROWIECKI, *supra* note 115, at 10.

usually information superior to crowds and will thus be more likely to reach the right decisions.

One may object to Waldron by noting that although crowds may be wise, there is something wrong with arguing for the wisdom of a crowd containing roughly 150 global supreme court justices when it strikes down an American statute passed by Congress and the President, who are the democratically elected representatives of over 310 million people. Crowd wisdom, one could say, points in the direction of greater democracy and less judicial review.

This argument is clever, but is not as persuasive as it at first seems. It compares apples to oranges, for America already has a supreme judicial authority—the U.S. Supreme Court—that invalidates legislation that has been democratically enacted by a majority of the American people acting through their elected representatives. A better comparison might arguably be between not the wisdom of 310 million Americans versus that of 150 international jurists, but between the wisdom of 310 million Americans against that of seven billion global citizens. Likewise, there may be greater crowd wisdom in the judgments of 150 jurists than in that of nine. Of course, this counterargument only holds up to the extent that the decisions of foreign judiciaries do in fact reflect democratic sentiments to some degree. Because this is not always the case, foreign court rulings may not always be as democratically legitimate as those of our Supreme Court since some foreign supreme courts play a role in picking their successors, though the size and nature of this role varies from country to country.⁸¹¹ This leads to a self-perpetuating feudal juristocracy that may be quite undemocratic; its courts may not be like our Supreme Court in following the election returns.

Constitutional court judges and academics who specialize in this field are increasingly in constant contact with one another. They have come to care about what they think of each other, and this reduces the extent to which their judgments are the result of independent use of their own particularized knowledge about their own legal systems. These developments undermine the wisdom-of-

811. See Mary L. Clark, *Judges Judging Judicial Candidates: Should Currently Serving Judges Participate in Commissions to Screen and Recommend Article III Candidates Below the Supreme Court Level?*, 114 PA. ST. L. REV. 49, 109-18 (2009). India has been criticized as having a “self-selecting” judiciary, see Sanford Levinson, *Identifying ‘Independence,’* 86 B.U. L. REV. 1297, 1304-05 (2006), while judicial selection in Israel has been described as “effectively dominated” by the chief justice, *id.* at 1306.

crowds argument. Additionally, the Condorcet's Jury Theorem argument assumes that "the judgment embodied in the practice of the other state is independent,"⁸¹² Posner and Sunstein say; when "a law was adopted out of imitation and not as a result . . . of independent judgment, an American court should discount the law of another state."⁸¹³ When these conditions are met, crowds may actually produce worse decisions than individuals because one bad judge can taint the deliberations of others. If foreign court *X* derives its judgment on a matter based on the fact that foreign courts *Y* and *Z* judged in a certain way, its judgment is not truly independent.

There is another problem with the knowledge argument that Professor Rosenkranz brings out admirably in his reply to Professors Posner and Sunstein.⁸¹⁴ His contention, somewhat paraphrased, is that searching for crowd wisdom among other nations' legal materials to answer American legal questions is foolish because the political theory undergirding American constitutionalism is fundamentally at odds with the logic of Condorcet's Jury Theorem.⁸¹⁵ According to Rosenkranz, "the Framers' vision" of the Constitution was more "localist" in nature, pointing to an emphasis on "decisionmaking mechanisms that harness multiple collective bodies with *distinctly varied* geographic and institutional perspectives, each answering subtly *different* questions."⁸¹⁶ Condorcet corresponded with and was known by several influential American Framers, including Benjamin Franklin,⁸¹⁷ Thomas Jefferson,⁸¹⁸ and James

812. Posner & Sunstein, *supra* note 71, at 136.

813. *Id.* at 163.

814. *See generally* Rosenkranz, *supra* note 135.

815. *Id.* at 1283 ("[T]he Constitution that the Framers ultimately wrote demonstrates a conception of governmental structure sharply different from that of Condorcet. In short, Condorcet's ideas can usefully inform constitutional interpretation—but primarily by way of contrast.").

816. *Id.*

817. *Id.* at 1288-89; *see also* Letter from the Marquis de Condorcet to Doctor Benjamin Franklin (Dec. 2, 1773), in 20 THE PAPERS OF BENJAMIN FRANKLIN 489-91 (William B. Willcox ed., 1976); Letter from Benjamin Franklin to the Marquis de Condorcet (Mar. 20, 1774), in 21 THE PAPERS OF BENJAMIN FRANKLIN 151-52 (William B. Willcox ed., 1978); Gerald Stourzh, *Reason and Power in Benjamin Franklin's Political Thought*, 47 AM. POL. SCI. REV. 1092, 1092 (1953) (stating Condorcet wrote that Franklin's "politics were those of a man who believed in the power of reason and the reality of virtue" (quoting 3 OEUUVRES DE CONDORCET 420 (A. Condorcet O'Connor & M.F. Arago eds., 2d ed. 1847))); PAUL MERRILL SPURLIN, THE FRENCH ENLIGHTENMENT IN AMERICA: ESSAYS ON THE TIMES OF THE FOUNDING FATHERS 124 (1984); SPURLIN, *supra*, at 185 n.26 (citing Letter from

Madison.⁸¹⁹ Moreover, his writings were familiar to a number of educated American readers at the time the Constitution was adopted,⁸²⁰ a necessary precondition of originalist relevance to the task of constitutional interpretation.⁸²¹ Condorcet's works "were indeed becoming familiar to Americans during this period."⁸²² In fact, "[h]e was . . . made a member of Franklin's [American]

Benjamin Franklin to the Marquis de Condorcet, *supra*, at 151-52); EDMUND S. MORGAN, BENJAMIN FRANKLIN 245 (2002).

818. Rosenkranz, *supra* note 135, at 1289-90; *see also* WILLARD STERNE RANDALL, THOMAS JEFFERSON: A LIFE 431 (1993); *Introduction* to CONDORCET: FOUNDATIONS OF SOCIAL CHOICE AND POLITICAL THEORY 15 (Iain McLean & Fiona Hewitt eds. & trans., 1994) ("Condorcet was even closer to Franklin's successor, Jefferson"); SPURLIN, *supra* note 817, at 122, 129; Arnold B. Urken, *The Condorcet-Jefferson Connection and the Origins of Social Choice Theory*, 72 PUB. CHOICE 213, 215, 218 (1991) ("Jefferson's library included copies of [the *Essai*,] *Lettres d'un Citoyen des Etats Unis* (1788) and *Sentiments d'un républicain sur les assemblées provinciales et les états généraux* (1788) as well as *Reflexions sur l'esclavage des nègres* (1788), and *Esquisse d'un tableau historique des progrès de l'esprit humain* (published posthumously in 1795).").

819. Rosenkranz, *supra* note 135, at 1290-91; *see also* Letter from Thomas Jefferson to James Madison (July 31, 1788), in 11 THE PAPERS OF JAMES MADISON 210, 212 (Robert A. Rutland & Charles F. Hobson eds., 1977); SPURLIN, *supra* note 817, at 122; Letter from Thomas Jefferson to James Madison (Jan. 12, 1789), in 11 THE PAPERS OF JAMES MADISON, *supra*, at 413 ("We have lately had three books published which are of great merit in different lines. . . . The second is a work on government by the Marquis de Condorcet I shall secure you a copy."); Iain McLean & Arnold B. Urken, *Did Jefferson or Madison Understand Condorcet's Theory of Social Choice?*, 73 PUB. CHOICE 445, 447-48 (1992) (noting that Madison possessed at least three works by Condorcet, including work in which the full Jury Theorem appears).

820. Rosenkranz, *supra* note 135, at 1291-92.

821. *See, e.g.*, Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 3, 38 (Amy Gutmann ed., 1997) ("I will consult the writings of some men . . . Hamilton[] and Madison[] . . . for example . . . because their writings, like those of other intelligent and informed people of the time, display how the text of the Constitution was originally understood. . . . What I look for in the Constitution is . . . the original meaning of the text"); *see also* BARNETT, *supra* note 201, at 89 ("[T]he words of the Constitution should be interpreted according to the meaning they had at the time they were enacted.").

822. Rosenkranz, *supra* note 135, at 1291; *see also* SPURLIN, *supra* note 817, at 121-29.

Philosophical Society”⁸²³ and an honorary citizen of New Haven, Connecticut.⁸²⁴

But Condorcet’s theories, Rosenkranz argues, are at odds with those contained within the U.S. Constitution, having been “either expressly rejected or substantially refined by the Framers.”⁸²⁵ Condorcet scorned bicameralism, preferring unicameralism instead.⁸²⁶ In fact, he said that bicameral legislatures reflect “fear of innovation, one of the most fatal scourges of the human race.”⁸²⁷ He did not remain silent in this criticism, but complained directly to Franklin.⁸²⁸ Condorcet’s rejection of bicameralism reflects his particular theory of political decision-making that undergirds the Jury Theorem:

Condorcet approached politics as an exercise in the *revelation of truth* by sampling from individuals’ beliefs that were more or less enlightened. . . . [W]hen political decision making is viewed in Condorcet’s terms, bicameralism amounts to splitting the sample information and results in a reduction in the effective sample size, rather than any improvement in the process.⁸²⁹

Condorcet’s Jury Theorem, Rosenkranz reminds us, relies on asking a number of people “the *same* question.”⁸³⁰ In contrast, the Framers understood that each chamber of the legislative body would answer “two slightly different questions.”⁸³¹ The very purpose of

823. Rosenkranz, *supra* note 135, at 1291-92 (citing Letter from Thomas Jefferson to Christian Frederick Michaelis and Others (Feb. 4, 1787), in 11 THE PAPERS OF THOMAS JEFFERSON 111, 111 (Julian P. Boyd ed., 1955)).

824. *See id.* at 1292; *see also* Max M. Mintz, *Condorcet’s Reconsideration of America as a Model for Europe*, 11 J. EARLY REPUBLIC 493, 494 (1991).

825. Rosenkranz, *supra* note 135, at 1292 (“[S]ome of Condorcet’s most central theories of constitutional design were either expressly rejected or substantially refined by the Framers.”).

826. *Id.* at 1293; *see also* McLean & Urken, *supra* note 819, at 450 (“Condorcet was opposed to bicameralism, which he believed had no theoretical justification; he believed that checks on tyrannical legislatures and executives were better achieved by appropriate criteria for the franchise and a suitable voting rule involving qualified majorities.”).

827. MARQUIS DE CONDORCET, ON THE PRINCIPLES OF THE CONSTITUTIONAL PLAN PRESENTED TO THE NATIONAL CONVENTION (1793), *reprinted in* CONDORCET: SELECTED WRITINGS, *supra* note 678, at 143, 156-57.

828. *See* JOYCE APPLEBY, LIBERALISM AND REPUBLICANISM IN THE HISTORICAL IMAGINATION 242 (1992).

829. Geoffrey Brennan & Alan Hamlin, *Bicameralism and Majoritarian Equilibrium*, 74 PUB. CHOICE 169, 177 (1992) (emphasis added).

830. Rosenkranz, *supra* note 135, at 1297.

831. *Id.* at 1295; *see also* THE FEDERALIST NO. 51, *supra* note 761, at 269 (James Madison) (“In republican government, the legislative authority necessarily

having a bicameral legislature is rooted in “the Great Compromise, under which one House was viewed as representing the people and the other the states, [which] allayed the fears of both the large and [the] small states.”⁸³² Rosenkranz explains that the House “would ask one question (‘is *X* good for the people?’), and the Senate would ask a different question (‘is *X* best implemented by the federal government rather than by the states?’). Only if a majority of *both* Houses answered their respective questions affirmatively could the measure become law.”⁸³³

Condorcet also rejected federalism as well as bicameralism, writing that “a nation which holds the purest principles of reason and justice, but which is alone in holding such principles, needs to be very closely united.”⁸³⁴ At “the French National Convention in 1793, Condorcet proposed primary assemblies that” would “address national—not local—concerns.”⁸³⁵ “[T]hese assemblies in which the citizen votes not for himself but for the whole nation,” he said, “are absolutely different, in form and in the territory to which they correspond, from those to which the same citizens could be called to deliberate as members of a particular territorial division. . . . [T]he primary assemblies do not act each for itself as a portion of the whole”⁸³⁶ Condorcet conceived of “politics as an exercise in the *revelation of truth* by sampling from individuals’ beliefs”;⁸³⁷ as such, he believed that questions of policy should be answered in one voice at the national level.⁸³⁸

predominates. The remedy for this inconveniency is, to divide the legislature into different branches; and to render them, by different modes of election, and different principles of action, as little connected with each other, as the nature of their common functions, and their common dependence on the society, will admit.”).

832. *INS v. Chadha*, 462 U.S. 919, 950 (1983); *see also* *Reynolds v. Sims*, 377 U.S. 533, 576 (1964) (“A prime reason for bicameralism, modernly considered, is to insure mature and deliberate consideration of, and to prevent precipitate action on, proposed legislative measures.”).

833. Rosenkranz, *supra* note 135, at 1295 (footnotes omitted).

834. MARQUIS DE CONDORCET, *A SURVEY OF THE PRINCIPLES UNDERLYING THE DRAFT CONSTITUTION* (1793), *reprinted in* CONDORCET: FOUNDATIONS OF SOCIAL CHOICE AND POLITICAL THEORY, *supra* note 818, at 190, 191.

835. Rosenkranz, *supra* note 135, at 1296.

836. CONDORCET, *supra* note 827, at 151.

837. Brennan & Hamlin, *supra* note 829, at 177 (emphasis added).

838. Rosenkranz, *supra* note 135, at 1296 (“Thus, Condorcet designed these primary assemblies to connect ‘the particular places in which citizens empirically lived’ with politics at the national level.” (quoting Nadia Urbinati, *Condorcet’s Democratic Theory of Representative Government*, 3 EUR. J. POL. THEORY 53, 67 (2004))).

Compare this to the text of the Tenth Amendment, which reads, “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”⁸³⁹ The Framers recognized that some policy questions are “inherently local,” relying on the particular circumstances, values, and conditions present in different jurisdictions.⁸⁴⁰ A policy can be neither “wise [n]or unwise in some abstract sense,” Rosenkranz says, but being “*inherently local*, turning on the special conditions of a place and the particular values and priorities of a people,” wise in some contexts and unwise in others.⁸⁴¹ “In short,” Rosenkranz says, “bicameralism recognizes that different legislative bodies may usefully ask subtly different questions about the same public policy, and federalism builds on this insight by recognizing that these subtly different questions may usefully reflect distinctly local concerns and mores.”⁸⁴² In contrast, Condorcet’s Jury Theorem requires that all jurors share the same circumstances and be asked precisely “the *same* question.”⁸⁴³

Finally, Condorcet’s conception of the role of juries as organs whose purpose is to produce “correct” outcomes⁸⁴⁴ is at odds with the localist vision of juries under the Constitution⁸⁴⁵—what Rosenkranz refers to as “its reification of juries.”⁸⁴⁶ Three of the original amendments in the Bill of Rights enshrine the right to a jury trial.⁸⁴⁷ According to the Fifth Amendment, “[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury.”⁸⁴⁸ The Seventh Amendment, in turn, ensures that

[i]n Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact

839. U.S. CONST. amend. X.

840. Rosenkranz, *supra* note 135, at 1297 (emphasis omitted).

841. *Id.*

842. *Id.*

843. *Id.*

844. *Id.* at 1298 (“From [Condorcet’s] perspective, the great advantage of a jury is that it increases the chance of a ‘correct’ decision—guilty people found guilty, liable people found liable, and so forth.”).

845. *Id.* at 1299 (“[T]he Framers . . . contemplated subtly *different* questions asked from place to place, questions that could not be disaggregated from the conditions of the place and the mores of the people.”).

846. *Id.* at 1297.

847. U.S. CONST. amends. V-VII.

848. *Id.* amend. V.

tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.⁸⁴⁹

The Sixth Amendment, Rosenkranz says, captures the sentiments of the Framers regarding the inherently local function and role of juries.⁸⁵⁰ It corrects Article III, which guarantees only that “[t]he Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed,” but not a local jury.⁸⁵¹ The Sixth Amendment promises that jurors themselves shall be “of the State and district wherein the crime shall have been committed.”⁸⁵² That this oversight was considered so grave as to merit its own correctional amendment is revealing toward the attitudes of the Framers regarding the jury as a local institution.⁸⁵³

A proponent of a jury trial for King Louis XVI,⁸⁵⁴ Condorcet argued that “the trial must be based on sound social choice procedures to insure that the jury would have a high probability of making a correct decision.”⁸⁵⁵ However, Rosenkranz makes clear that the rationale in the United States for having juries extended beyond their likelihood of reaching “correct” decisions or their truth-seeking abilities—it closely relates to the principle of federalism.⁸⁵⁶ Juries do not ask merely whether the accused has broken the law in an objective, national sense, Rosenkranz says, but ask whether the accused has broken the law by particular local standards specific to that state.⁸⁵⁷ Akhil Amar sums it up by saying, “[T]he jury would be composed of citizens from the same community, and *its actions were expected to be informed by community values*.”⁸⁵⁸ Or, says Rosenkranz, “to put the point another way, under the Bill of Rights, even guilt or innocence *in the eyes of God* is a local question.”⁸⁵⁹

849. *Id.* amend. VII.

850. Rosenkranz, *supra* note 135, at 1298-99.

851. U.S. CONST. art. III, § 2, cl. 3.

852. *Id.* amend. VI.

853. Rosenkranz, *supra* note 135, at 1298-99.

854. *Id.* at 1298.

855. *See* Urken, *supra* note 818, at 221.

856. Rosenkranz, *supra* note 135, at 1299.

857. *See id.*

858. AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 88-89 (1998) (emphasis added).

859. Rosenkranz, *supra* note 135, at 1299; *see also* AMAR, *supra* note 858, at 34 (“The original establishment clause . . . is not antiestablishment but pro-states’ rights; it is agnostic on the substantive issue of establishment versus nonestablishment and simply calls for the issue to be decided locally.”).

The Framers of the U.S. Constitution were familiar with the Condorcet Jury Theorem,⁸⁶⁰ and they knew that Condorcet thought it meant the ideal constitution should have a one-house legislature.⁸⁶¹ Condorcet disliked separation of powers,⁸⁶² bicameralism,⁸⁶³ and federalism,⁸⁶⁴ but the Framers did not share his views.⁸⁶⁵ They, Rosenkranz concludes, “self-consciously rejected many of Condorcet’s most central notions of constitutional structure, and the Constitution itself refutes the use of foreign law in its interpretation.”⁸⁶⁶ Madison and others wanted a democratic constitution that would protect citizens from transient passions of the moment and that would lead to more deliberative democracy.⁸⁶⁷ The Madisonian system of checks and balances harnesses crowd wisdom but filters it through many institutions to guarantee that the crowd wisdom is arrived at independently and is not just a passing fad.⁸⁶⁸ The U.S. Constitution is thus built on the “self-conscious[]” repudiation of the Condorcet Jury Theorem with respect to “some of [Condorcet’s] most central theories of constitutional design.”⁸⁶⁹ This suggests that the Condorcet Jury Theorem, as Condorcet understood it, is inapplicable to U.S. constitutional law.

V. CRITICISMS OF THE HAYEKIAN *IUS GENTIUM*

Throughout this Article, we have tried to strengthen and improve upon Professor Waldron’s theoretical justification of the *ius gentium* with an appeal to the virtues of a Hayekian system of spontaneous order. Nonetheless, Waldron’s *ius gentium* remains vulnerable to a variety of criticisms, even beyond those to which we have alluded thus far. In this Part, we will acknowledge some of the

860. See Rosenkranz, *supra* note 135, at 1293 (“Condorcet reluctantly accepted American-style separation of powers, but about bicameralism, he was adamant. And he let the Framers know it.” (footnote omitted)).

861. *Id.*

862. *Id.*

863. *Id.*

864. *Id.* at 1295 (“Condorcet apparently opposed federalism, at least for France.”).

865. *Id.* at 1308 (“But text, history, and structure show that the Framers either expressly rejected or significantly refined many of Condorcet’s most central ideas.”).

866. *Id.* at 1286.

867. See THE FEDERALIST NO. 51, *supra* note 761, at 269-70 (James Madison).

868. See *id.*

869. Rosenkranz, *supra* note 135, at 1300.

additional criticisms that might militate against even a Hayekian *ius gentium*, and in the next Part we try to address these criticisms and respond to them.

A. The Difficulty of Knowing Which Lines to Draw

One practical difficulty with the *ius gentium* is determining the extent to which we should treat courts of different countries alike. Which factors should judges take into account when weighing the legal materials of one nation against those of another? There must be some basic principles guiding the judge on this matter, lest the invocation of foreign law becomes a screen for lawmaking from the bench.⁸⁷⁰

This is certainly the fear of Justice Scalia, who said with regard to the citation of foreign law by American judges:

“I mean, it lends itself to manipulation. It invites manipulation. You know, I want to do this thing; I have to think of some reason for it. I have to write something that—you know, that sounds like a lawyer. I have to cite *something*. . . . I can’t cite a prior American opinion because I’m overruling two centuries of practice. . . . So my goodness, what am I going to use? . . . I have a decision by an intelligent man in Zimbabwe or anywhere else and you put it in there and you give the citation. By God, it looks lawyerly! . . . And it lends itself to manipulation. It just does.”⁸⁷¹

At his confirmation hearing for Supreme Court Chief Justice, John Roberts likened citing foreign legal materials to “‘looking out over a crowd and picking out your friends.’”⁸⁷²

Scalia says his colleagues cite foreign law “[w]hen it agrees with what the justices would like the case to say . . . [but] when it doesn’t agree we don’t use it.”⁸⁷³ He repeated this charge in his *Roper* dissent, accusing the majority of citing foreign law only when doing so supports the outcomes they seek.⁸⁷⁴ “To invoke alien law

870. Waldron says that “[t]he objection is that the use of foreign law is undisciplined by any jurisprudence more scrupulous than [cherry picking].” WALDRON, *supra* note 75, at 171.

871. Dorsen, *supra* note 137, at 531 (quoting Justice Antonin Scalia).

872. *Transcript: Day Two of the Roberts Confirmation Hearings*, WASH. POST (Sept. 13, 2005, 3:55 PM) (quoting Chief Justice John Roberts), <http://www.washingtonpost.com/wp-dyn/content/article/2005/09/13/AR2005091301210.html>; see also Sheryl Gay Stolberg & Adam Liptak, *Roberts Fields Questions on Privacy and Precedents*, N.Y. TIMES, Sept. 14, 2005, at A1 (quoting Chief Justice John Roberts).

873. Dorsen, *supra* note 137, at 521 (quoting Justice Antonin Scalia).

874. *Roper v. Simmons*, 543 U.S. 551, 624, 627 (2005) (Scalia, J., dissenting) (“[T]he basic premise of the Court’s argument—that American law

when it agrees with one's own thinking, and ignore it otherwise, is not reasoned decisionmaking, but sophistry," he writes.⁸⁷⁵

Even Justice Breyer, who believes that foreign law may sometimes be relevant to American cases, worries that "[o]nce we start to refer to foreign opinions, how do we know we can keep matters under control? How do we know we have referred to opinions on both sides of the issue?"⁸⁷⁶

How much should an Italian precedent weigh against an Australian precedent? Is the ruling of an Israeli court of less or greater value to an American judge than a South African decision? Which countries should we exclude from consideration altogether? Surely Professor Waldron does not advocate that North Korean law should influence American jurisprudence. Do we reject nations with poor human rights records? Should we assign greater weight to the laws of countries with similar legal institutions to ours? Perhaps American judges should give greater consideration to common law nations than nations with civil law, mixed legal systems, or Sharia legal systems. With respect to foreign judiciaries, should more weight be accorded to constitutional courts than lower courts?

Another question is whether weight should be given to decisions rendered by foreign courts in proportion to the degree of responsiveness of those courts to democratic opinion in their countries. In the United States, the executive and legislative branches check the judicial branch in several important ways. The President appoints Supreme Court Justices and federal judges with the advice and consent of the Senate,⁸⁷⁷ a process that tends to ensure that over time the ideological bent of the Supreme Court eventually corresponds in a rough way to national election results.⁸⁷⁸ While the threat of judicial impeachment is a blunt tool that has been rarely

should conform to the laws of the rest of the world—ought to be rejected out of hand. In fact the Court itself does not believe it.”). Justice Scalia then goes on to describe the many ways in which the Supreme Court has declined to adopt foreign legal practices. *Id.* at 624-27. “The Court,” he says, “should either profess its willingness to reconsider all these matters in light of the views of foreigners, or else it should cease putting forth foreigners’ views as part of the *reasoned basis* of its decisions.” *Id.* at 627.

875. *Id.* at 627.

876. Dorsen, *supra* note 137, at 523 (quoting Justice Stephen Breyer).

877. U.S. CONST. art. II, § 2, cl. 2.

878. Cf. Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279, 284-85 (1957); see also GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* 13 (1991).

used—since 1789 only fifteen federal judges have been impeached, and only eight have been removed from office in this way⁸⁷⁹—it is nonetheless an option Congress may theoretically exercise in extreme cases.⁸⁸⁰ For these and other reasons, Yale political scientist Robert Dahl argued that the U.S. Supreme Court is in fact responsive to national, if not regional, majority opinion.⁸⁸¹

In contrast, many global courts are not nearly so responsive to popular opinion in their home countries. Supreme court justices in the United Kingdom, India, and Israel play a large role in selecting their own successors, and these courts are therefore highly unresponsive to democratic sentiments.⁸⁸² In some countries, the constitutional court may even strike down constitutional amendments as unconstitutional.⁸⁸³ This lack of democratic accountability is even more problematic given that a global *ius gentium* cannot be checked by a global executive or global legislature. In other countries, constitutional courts are arguably too political. German and Italian constitutional court judges are selected through very political processes; in comparison, the system of presidential nomination and senatorial advising and consent is decidedly meritocratic. French and Japanese constitutional court justices tend to be political elder statesmen who serve short terms and cannot be considered insulated from the political process. In Germany, settled custom dictates that half of the court's justices come from the left and half from the right. When deciding how much weight to accord the legal judgments of foreign nations, should we not consider how their processes for judicial selection differ from ours and the problems these can pose?

Foreign constitutional courts are also often fundamentally different from both the U.S. Supreme Court and one another in several other important ways. Unlike our Supreme Court, many European constitutional courts have justices who are selected in a political way, serve staggered terms, and issue opinions that are binding on all of society, not just the parties to a case. When the U.S. Supreme Court strikes down a statute, it remains on the books but is unenforceable, ready to come back to life should the decision that

879. *History of the Federal Judiciary: Impeachments of Federal Judges*, FED. JUD. CENTER, http://www.fjc.gov/history/home.nsf/page/judges_impeachments.html (last visited Feb. 23, 2015).

880. U.S. CONST. art. II, § 4; *id.* art. III, § 1.

881. Dahl, *supra* note 878, at 281, 294.

882. See Clark, *supra* note 811, at 114, 118.

883. See generally Aharon Barak, *Unconstitutional Constitutional Amendments*, 44 ISRAEL L. REV. 321 (2011).

ruled it unconstitutional be overturned in the future. In contrast, many European constitutional courts strike the offending statute from the books entirely. Should American judges give equal weight to decisions by politically insulated courts and more overtly political courts? To democratically responsive and unresponsive courts? To courts that strike laws from the books and courts that merely render them unenforceable? These are but some of the practical questions which supporters of the *ius gentium* must address that arise with the citation of foreign legal materials.

B. The Economics of Federalism

In addition to these practical challenges, there are economics-of-federalism advantages to not having an *ius gentium* that Professor Waldron does not sufficiently address. Uniformity in the law is not always a good thing, and there are often gains to be realized from competition among jurisdictions and experimentation with legal rules.⁸⁸⁴ Indeed, there are several economics-of-federalism arguments that weigh powerfully against a centralized, globally uniform *ius gentium*, even if developed as the result of a spontaneous system of order.

First, as Professor Calabresi and Nicholas Terrell show, “tastes, conditions, and preferences” vary from country to country in ways that sometimes make uniformity in the law a bad thing.⁸⁸⁵ For example, people in Portugal may have a different idea about whether drugs should be criminalized than people in Singapore.⁸⁸⁶ Federalism, decentralization, and perpetuation of the Westphalian sovereign nation state allow both of these peoples to be happy by recognizing

884. See generally Calabresi & Terrell, *supra* note 160, at 34; Steven G. Calabresi & Lucy D. Bickford, *Federalism and Subsidiarity: Perspectives from U.S. Constitutional Law* (Nw. Univ. Sch. of Law Scholarly Commons, Working Paper No. 215, 2011), available at <http://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1214&context=facultyworkingpapers>.

885. Calabresi & Terrell, *supra* note 160, at 32 (speaking in the context of federalism, the authors make this point with respect to American states, but their broader insight is not limited to that context and applies to nations as well).

886. Cf. Wiebke Hollersen, “*This Is Working*”: Portugal, 12 Years After Decriminalizing Drugs, SPIEGEL ONLINE (Mar. 27, 2013, 11:32 AM), <http://www.spiegel.de/international/europe/evaluating-drug-decriminalization-in-portugal-12-years-later-a-891060.html>; Rachel Armstrong & Jeremy Laurence, *Singapore Lifts Death Penalty on Drug Trafficker for First Time*, REUTERS (Nov. 14, 2013, 3:22 AM), <http://www.reuters.com/article/2013/11/14/us-singapore-death-idUSBRE9AD0BG20131114> (“The wealthy city-state of Singapore has for the first time lifted the death penalty given to a drug trafficker . . .”).

that tastes differ.⁸⁸⁷ Indeed, imposing the legal tastes of one jurisdiction on another could easily be intolerant and even totalitarian. Just as the fact that “tastes, conditions, and preferences vary geographically is a powerful argument for state power in the United States,” so is variance in the tastes and preferences of nation states important.⁸⁸⁸ While certain fundamental rights, such as the right not to be murdered, are universal, there should be a large “margin of appreciation,” or “federalism discount,” to permit nations “to vary from the approach followed by other regions in the enforcement of rights,”⁸⁸⁹ owing to varying differences in tastes, preferences, and conditions.

In this regard, the imposition of a global *ius gentium* would undesirably take away the freedom of exit.⁸⁹⁰ Federalism is an important structural feature of American constitutional government; it allows the states to offer a diverse variety of bundles of policy goods to satisfy different citizens’ tastes.⁸⁹¹ The world is large and diverse, even as compared to large federations like the United States or the European Union. Because different individuals have different tastes and preferences, and because these different tastes and preferences correlate with geography, “[b]y devolving some power from the national to the sub-national level, constitution writers can hope to maximize social welfare and utility.”⁸⁹² If the main flaw of democracy is tyranny of the majority, as Madison feared it would be,⁸⁹³ federalism provides at least a partial solution by allowing minorities whose interests would otherwise go unrealized to exercise meaningful political power without being outvoted by the majority every time.⁸⁹⁴ In this respect, uniform central lawmaking cannot achieve the degree of efficiency maximization as federalism, as Professor McConnell illustrates with an example:

[A]ssume that there are only two states, with equal populations of 100 each. Assume further that 70 percent of State A, and only 40 percent of

887. See Calabresi & Terrell, *supra* note 160, at 32.

888. *Id.*

889. Calabresi & Bickford, *supra* note 884, at 75.

890. Cf. Richard A. Epstein, *Exit Rights Under Federalism*, 55 LAW & CONTEMP. PROBS. 147 (1992).

891. Calabresi, *Limited and Enumerated Powers*, *supra* note 160, at 754, 775.

892. Calabresi & Terrell, *supra* note 160, at 32.

893. Steven G. Calabresi, Note, *A Madisonian Interpretation of the Equal Protection Doctrine*, 91 YALE L.J. 1403, 1404-05 (1982) (citing THE FEDERALIST NO. 10, at 77 (James Madison) (Clinton Rossiter ed., 1961)).

894. *Id.* at 1404.

State B, wish to outlaw smoking in public buildings. The others are opposed. If the decision is made on a national basis by a majority rule, 110 people will be pleased, and 90 displeased. If a separate decision is made by majorities in each state, 130 will be pleased, and only 70 displeased. The level of satisfaction will be still greater if some smokers in State A decide to move to State B, and some anti-smokers in State B decide to move to State A.⁸⁹⁵

Second, the lack of a globally enforced *ius gentium* allows for competition among jurisdictions with regard to the “bundles of public goods”⁸⁹⁶ they offer citizens.⁸⁹⁷ “Citizens and businesses will vote with their feet for the optimal bundle, and states will experiment and compete vigorously with one another as a result.”⁸⁹⁸ This is good for the same reason that competition is good in the marketplace;⁸⁹⁹ we should be wary of surrendering competition to a global judicial monopoly provider. If “government is the surest source of monopoly,” we may be reluctant to allow the judiciaries of foreign governments to bind us.⁹⁰⁰ This concern is keenly felt by Americans, many of whom came to this country to escape from bad governments in Europe and elsewhere.

Third, a universally enforced *ius gentium* would stifle experimentation among jurisdictions by imposing a standardized set of legal rules, preventing them from, as Calabresi and Terrell said in a different context, “competing with one another to offer their voters the optimal bundle of public goods.”⁹⁰¹ When countries experiment with different bundles of public goods, they attempt to lure people and global capital to their shores, who “will vote with their feet.”⁹⁰² Experimentation is as good a thing in law as it is in science and economics, and a Hayekian *ius gentium* would reduce experimentation and jurisdictional competition.

895. Michael W. McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. CHI. L. REV. 1484, 1494 (1987) (reviewing RAOUL BERGER, *FEDERALISM: THE FOUNDERS' DESIGN* (1987)).

896. Calabresi & Terrell, *supra* note 160, at 34.

897. *Cf. id.* at 34-35 (“[A]ntitrust law . . . tells us that a free market with forty-eight players generally will be more competitive and will lead to more experimentation and innovation than a market with thirty-four or thirteen players. As the number of players goes up, the market share of the largest players will be likely to go down, and the ability of the players to coordinate their activities voluntarily to form a cartel on their own will go down, too.”).

898. *Id.* at 34.

899. *Cf. id.* at 34-35.

900. *Id.* at 37.

901. *Id.* at 34.

902. *Id.*

Finally, a universally enforced *ius gentium* would raise the agency costs of monitoring and checking what supreme courts and constitutional courts are actually doing with their judicial-review power all over the world.⁹⁰³ In democracies, “[v]oters will experience lower costs monitoring their politicians in smaller democracies, and they will be better able to rein in their elected agents.”⁹⁰⁴ Citizens can more easily monitor their national courts than foreign courts “because they are closer to home, easier to . . . see . . . and are generally more accessible.”⁹⁰⁵ Synthesizing and distilling the judgments of the world’s jurists into a coherent and sensible conclusion is a monumental task, one that grows in difficulty in proportion to the number of nations whose legal judgments must be consulted.⁹⁰⁶ “[M]onitoring cost[s], of course, rise[] when the agent is further removed from the principal,” Calabresi and Terrell say.⁹⁰⁷ “In respect to the use of foreign law itself, I would say that I understand that a judge cannot read everything,” Justice Breyer said.⁹⁰⁸ It is difficult enough to keep track of what the U.S. Supreme Court does; it would be impossible to keep track of what every constitutional court in the world is doing. Even American judges can occasionally experience difficulty keeping track of American rulings. If under the *ius gentium* judges would in fact strive to examine all sides of an issue and not just selectively choose the foreign decisions that suit their own thinking—“would refer to materials that support positions that the judge disfavors as well as those that he favors,” as Justice Breyer says⁹⁰⁹—the difficulty of monitoring dozens and dozens of foreign supreme courts could be a problem.

C. The Argument That the United States Is a Shining City on a Hill⁹¹⁰

Waldron also fails to account for the fact that, as Professor Calabresi has argued elsewhere, the United States is truly different

903. Cf. Calabresi & Bickford, *supra* note 884, at 13, 17, 59 (discussing monitoring costs in the context of American federalism).

904. Calabresi & Terrell, *supra* note 160, at 38; see also ANTHONY DOWNS, AN ECONOMIC THEORY OF DEMOCRACY 258-59 (1957) (analyzing rational ignorance and information costs in voting).

905. Calabresi & Terrell, *supra* note 160, at 38.

906. WALDRON, *supra* note 75, at 88.

907. Calabresi & Terrell, *supra* note 160, at 38.

908. Dorsen, *supra* note 137, at 524 (quoting Justice Stephen Breyer).

909. *Id.* at 523 (quoting Justice Stephen Breyer).

910. See generally Calabresi, *American Exceptionalism*, *supra* note *.

from Europe and Canada in some ways that may help explain why other nations should and do cite our Constitution, but we do not cite theirs.⁹¹¹ First, the United States is the third largest country in the world in terms of population size,⁹¹² is the third largest in terms of geographic area,⁹¹³ and has the world's highest GDP.⁹¹⁴ Some of the other countries whose judicial decisions Waldron would have us examine are tiny population wise, are tiny geographically, or have low economic output. New Zealand, a country Waldron mentions several times,⁹¹⁵ ranks 127th in terms of global population.⁹¹⁶ South Africa, which he likewise discusses several times,⁹¹⁷ ranks 26th in the world in terms of GDP.⁹¹⁸ Canada is culturally similar to us in many ways and is geographically large, but it has only approximately one-tenth our population and thus has fewer residents than does the state of California.⁹¹⁹ Nations such as Denmark are more comparable in size, population, and GDP to Minnesota than they are comparable to the United States of America.⁹²⁰ None of the countries that have judicial review that Waldron compares to America are remotely comparable to us in terms of population, geographic size, or economic output. Notable exceptions include the European Union, which does not really have a government and suffers from a severe democracy deficit, as well as India, which is much poorer than the

911. See generally *id.*

912. *The World Factbook: Country Comparison:: Population*, CIA, <https://www.cia.gov/library/publications/the-world-factbook/rankorder/2119rank.html> (last visited Feb. 23, 2015) [hereinafter *Population Comparison*].

913. *The World Factbook: Country Comparison:: Area*, CIA, <https://www.cia.gov/library/publications/the-world-factbook/rankorder/2147rank.html> (last visited Feb. 23, 2015) [hereinafter *Area Comparison*].

914. *The World Factbook: Country Comparison:: GDP (Purchasing Power Parity)*, CIA, <https://www.cia.gov/library/publications/the-world-factbook/rankorder/2001rank.html> (last visited Feb. 23, 2015) [hereinafter *GDP Comparison*].

915. WALDRON, *supra* note 75, at 12, 17-21, 62, 70, 72, 80-81, 109-12, 115, 123, 126, 128, 133-34, 146, 163, 182, 185, 201.

916. *Population Comparison*, *supra* note 912.

917. WALDRON, *supra* note 75, at 15, 19, 21, 78-79, 82, 123, 143, 161, 174, 201, 209.

918. *GDP Comparison*, *supra* note 914.

919. *Population Comparison*, *supra* note 912; see also *State & County QuickFacts: California*, U.S. CENSUS BUREAU, <http://quickfacts.census.gov/qfd/states/06000.html> (last updated Feb. 5, 2015).

920. See *Population Comparison*, *supra* note 912; *Area Comparison*, *supra* note 913; *GDP Comparison*, *supra* note 914.

United States.⁹²¹ Germany is large and prosperous, but it has only about one-quarter of the population of the United States.⁹²² Moreover, our Constitution is by far the oldest democratic constitution in the world still in use,⁹²³ and the constitutions Waldron would compare it with may not stand the test of time.

The United States of America is exceptional not necessarily because we are better than other countries, but because we are also very different.⁹²⁴ “For almost four hundred years, Americans have defined the United States as an exceptional nation with an exceptional mission in the world,” Professor Calabresi has written.⁹²⁵ “This self-definition is a part of the ideology of what it means to be an American, and it is quite literally un-American to think the United States is not a special place.”⁹²⁶ We are a nation of immigrants who fled other countries to get away from their laws and tyrannies. This is not true of most other nations. countries like India and Germany contain few immigrants and have cultures, which date back centuries if not millennia, that are often quite different from ours. Ronald Reagan described America “as a beacon of freedom for the whole world”;⁹²⁷ we are not confident that all foreign countries understand themselves this way.

Moreover, there is no requirement of comity that, just because the courts of other sovereign nations cite American law with regularity, we are therefore obligated to do the same. Nations such as South Africa with young constitutions and limited experience⁹²⁸ grappling with difficult jurisprudential issues that the United States has faced over the course of centuries may have much to learn from our experiences, but this does not imply that their own experiences are in turn valuable to us. “America is a forerunner in constitutional

921. *GDP Comparison*, *supra* note 914.

922. *Id.*; *Population Comparison*, *supra* note 912; *Area Comparison*, *supra* note 913.

923. *Constitution of the United States of America*, ENCYCLOPAEDIA BRITANNICA, <http://www.britannica.com/EBchecked/topic/134197/Constitution-of-the-United-States-of-America> (last updated Jan. 9, 2014).

924. See Calabresi, *American Exceptionalism*, *supra* note *, at 1339 (“[T]he United States is an exceptional country, different from every other country in the world.”).

925. *Id.* at 1344.

926. *Id.* at 1344-45.

927. *Id.* at 1415.

928. The South African Constitution was promulgated on December 18, 1996, and commenced on February 4, 1997. See S. AFR. CONST., 1996, *available at* <http://www.gov.za/sites/www.gov.za/files/images/a108-96.pdf>.

analysis and [perhaps should] not take lessons from those who are haltingly following its example.”⁹²⁹

In his critique of Posner and Sunstein, Nicholas Rosenkranz asserts that “Condorcet’s vision of law and politics was distinctly ‘universalist,’ imagining all people everywhere seeking the correct answer to questions of law and policy.”⁹³⁰ Condorcet’s Jury Theorem, Rosenkranz says, “assum[es] that all jurors are answering the same abstract question.”⁹³¹ In contrast, Rosenkranz says, “the Framers’ vision, as reflected in many of the Constitution’s textual and structural features, was distinctly more localist”;⁹³² the Constitution “evinces a clear vision that most questions of law and policy are inherently local.”⁹³³ According to this view, the premise on which the argument for citing foreign law is based is flawed; international legal uniformity is, according to this view, not a good to be pursued at all.⁹³⁴ In fact, Rosenkranz says, the concept is wholly antithetical to our Constitution, which “favors decisionmaking mechanisms that harness multiple collective bodies with *distinctly varied* geographic and institutional perspectives, each answering subtly *different* questions.”⁹³⁵

While supporters of the *ius gentium* may note that other countries already cite our Constitution but that we do not cite theirs, there is good reason for this phenomenon. First, as we just mentioned, our Constitution is considerably older than any other written constitution in the world and has inspired other countries’ constitutions, whereas no foreign constitution inspired our own. Just as the English Bill of Rights is historically important to our interpretation of the Eighth Amendment,⁹³⁶ our Constitution is similarly relevant to the French, German, Japanese, and South African constitutions, all of which were inspired to some degree or another by ours. Our Constitution is, if you will, part of the

929. WALDRON, *supra* note 75, at 82.

930. See Rosenkranz, *supra* note 135, at 1283.

931. *Id.* at 1308.

932. *Id.* at 1283.

933. *Id.* at 1301.

934. *Id.* (“[T]he Constitution itself furnishes an answer to whether it should be interpreted by reference to foreign law. It evinces a clear vision that most questions of law and policy are inherently local.”).

935. *Id.* at 1283.

936. The phrase “cruel and unusual punishment” was lifted almost verbatim from the English Bill of Rights. *Congressional Research Service Annotated Constitution: Eighth Amendment*, LEGAL INFO. INST. http://www.law.cornell.edu/anncon/html/amdt8_user.html (last visited Feb. 23, 2015).

legislative history that informed the drafting of the French, German, Japanese, and South African constitutions. These constitutions do *not*, however, illuminate the original meaning or legislative history of our own Constitution. Therefore, it may well make a lot of sense for the rest of the world to cite American law, but not for us to cite theirs.

From a cultural standpoint, as Professor Calabresi has argued, American exceptionalism is defined by a belief that “this land is a beacon of liberty and hope to oppressed seekers of freedom from all over the world.”⁹³⁷ The struggles of “World War II, the Cold War, and McCarthyism were all efforts to save the world from totalitarianism.”⁹³⁸ The idea that the United States should aspire to be “a shining city on a hill” goes back to a speech given by John Winthrop, the leader of the Massachusetts Bay colony.⁹³⁹ Therefore, perhaps we

ought to reject Supreme Court citation of foreign law on the grounds that: (1) the American people, whose Constitution is at issue, think America is an exceptional place, which by definition should have exceptional laws; and (2) America has in fact become an exceptional place to which it would not be appropriate to apply European or Canadian laws.⁹⁴⁰

Put another way, today “American popular culture overwhelmingly rejects the idea that the United States has a lot to learn from foreign legal systems, including even those of countries to which we are closely related like the United Kingdom and Canada.”⁹⁴¹ Because we seek to be a “shining city on a hill,” one might say, we should not submit to “a legal, political, and social

937. Calabresi, *American Exceptionalism*, *supra* note *, at 1415.

938. *Id.* at 1366.

939. *Id.* at 1347-48 (“This vision also animated John Winthrop, the leader of the Massachusetts Bay colonists, who in his sermon *A Modell of Christian Charity* ‘describ[ed] the special destiny awaiting the community of saints as they voyaged to Massachusetts’ and uttered the famous quote that appears at the beginning of this Article about Massachusetts becoming a city on a hill.” (alteration in original) (footnote omitted) (quoting DEBORAH L. MADSEN, *AMERICAN EXCEPTIONALISM* 18 (1998))).

For wee must consider that wee shall be as a citty upon a hill. The eies of all people are uppon us. Soe that if wee shall deale falsely with our God in this worke wee haue undertaken, and soe cause him to withdrawe his present help from us, wee shall be made a story and a by-word through the world.

John Winthrop, *A Modell of Christian Charity* (1630), reprinted in 1 SETTLEMENTS TO SOCIETY: 1584-1763, at 66, 68 (Jack P. Greene ed., 1966).

940. Calabresi, *American Exceptionalism*, *supra* note *, at 1338.

941. *Id.* at 1337.

culture quite different from our own.”⁹⁴² According to Professor Calabresi, this puts American culture, which presumes that “the United States is an exceptional country that differs sharply from the rest of the world and that must therefore have its own laws and Constitution,” at odds with those who say that American courts have much to learn from the law of sovereign, foreign nation states.⁹⁴³

Moreover, says Professor Calabresi, “not only do Americans think of the United States as an exceptional country, but it has actually become an exceptional country as it has attracted immigrants with a unique constellation of ideological beliefs.”⁹⁴⁴ Americans are much “more individualistic, more religious, more patriotic, more egalitarian, and more hostile to unions and Marxism than are the people of any other advanced democracy.”⁹⁴⁵ As he notes, all of this casts doubt on the “practicality and wisdom of our Supreme Court imposing foreign ideas about law on us.”⁹⁴⁶

In his *Roper* dissent, Justice Scalia said, with regard to the importation of British law into American constitutional law, that

[i]t is beyond comprehension why we should look, for that purpose, to a country that has developed, in the centuries since the Revolutionary War—and with increasing speed since the United Kingdom’s recent submission to the jurisprudence of European courts dominated by continental jurists—a legal, political, and social culture quite different from our own.⁹⁴⁷

Elsewhere, he has said:

“[W]e *don’t* have the same moral and legal framework as the rest of the world, and never have. If you told the framers of the Constitution that we’re to be just like Europe, they would have been appalled. If you read the Federalist Papers, they are full of statements that make very clear the framers didn’t have a whole lot of respect for many of the rules in European countries. Madison, for example, speaks contemptuously of the countries of continental Europe, ‘who are afraid to let their people bear arms.’”⁹⁴⁸

942. *Roper v. Simmons*, 543 U.S. 551, 627 (2005) (Scalia, J., dissenting).

943. Calabresi, *American Exceptionalism*, *supra* note *, at 1337.

944. *Id.*

945. *Id.*

946. *Id.*

947. 543 U.S. at 626-27 (Scalia, J., dissenting).

948. Dorsen, *supra* note 137, at 521 (quoting Justice Antonin Scalia).

D. Foreign Law and American Sovereignty

Sovereignty is an essential characteristic of nationhood. Critics of the *ius gentium*, such as Donald Kochan, note that “[w]hen authorities begin to allow the piercing of the veil of sovereignty—allowing outside sources to pierce the boundaries of domestic law—there is a surrender of the legislative autonomy a Nation holds in a Westphalian system.”⁹⁴⁹ Kochan concludes that the “right to exclude, the right to include, and the methods for determining lie at the heart of sovereign authority.”⁹⁵⁰ Waldron’s *ius gentium*, as he acknowledges himself, is liable to accusations of democratic illegitimacy⁹⁵¹ and to the claim that it infringes on American sovereignty.⁹⁵² “In virtue of what is the principle about the juvenile death penalty law for us?” Waldron rightly asks.⁹⁵³ Americans have not consented to be governed by foreign law nor submitted to its authority, and we could not democratically overturn a foreign law even if we wanted to. “Nobody made it law for us; nobody laid it down as such,” Waldron says.⁹⁵⁴ One can argue that the citation of non-American law by American courts is antidemocratic and undermines the notion of American sovereignty by subjecting the American people to law they did not approve—an idea that seems incompatible with the notions of sovereignty and of self-government.⁹⁵⁵ “Citing foreign decisions,” says Richard Posner, “is best understood as an effort to mystify the adjudicative process and disguise the political decisions that are the core of the Supreme Court’s constitutional output.”⁹⁵⁶ To quote Felix Cohen’s criticism of legal unreality, “[O]ne may suspect that a court would not consistently hide behind a barrage of transcendental nonsense if the grounds of its decisions were such as could be presented without shame to the public.”⁹⁵⁷ If foreign law imposes constraints on the ability of Americans to make their own law, Waldron asks, aren’t

949. Donald J. Kochan, *Sovereignty and the American Courts at the Cocktail Party of International Law: The Dangers of Domestic Judicial Invocations of Foreign and International Law*, 29 FORDHAM INT’L L.J. 507, 512 (2006).

950. *Id.*

951. WALDRON, *supra* note 75, at 142-43.

952. *Id.* at 168-70.

953. *Id.* at 49.

954. *Id.* (emphasis omitted).

955. *Id.* at 142-43, 168-70.

956. Posner, *supra* note 81, at 88.

957. Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 820 (1935).

judges putting something over on them “via some sneaky, self-serving academic theory”⁹⁵⁸

Under our Constitution, a valid federal law must be passed in identical form by both the Senate and the House of Representatives and be presented to the President for his signature.⁹⁵⁹ The arduous process of passing a bill through two legislative chambers and presenting it to the President (or governor, in the case of state legislation) for his or her possible veto endows domestic statutes with an authority and a legitimacy that other sources of law lack.⁹⁶⁰ This is even truer of constitutional amendments, which must pass both Houses of Congress by two-thirds majorities and then be ratified by three-quarters of the States.⁹⁶¹ Under H.L.A. Hart’s theory of legal positivism, a law is not valid unless it is recognized as such by society’s relevant “rules of recognition.”⁹⁶² Foreign laws obviously are not valid under our “rules of recognition,”⁹⁶³ which are laid out respectively in Article I and in Article V of the Constitution.⁹⁶⁴ American laws may not always be wise—that is a subjective question—but at least they are American laws, created by our elected representatives through the standard democratic process.

“Americans are, after all, Americans, not New Zealanders, South Africans, or Europeans,” Waldron acknowledges.⁹⁶⁵ “Foreigners have their views . . . and we have ours.”⁹⁶⁶ In his explanation of why he opposes the citation of foreign law, Justice Scalia says that his theory of constitutional interpretation involves “‘try[ing] to understand what it meant, what it was understood by the society to mean when it was adopted. . . . It should be easy to understand why, for someone who has my theory of interpretation, why foreign law is irrelevant.’”⁹⁶⁷ One need not be an originalist to be troubled by the application of the law of other sovereign nations by American courts. Why should American courts apply laws that have been neither created nor explicitly adopted by the American people? How can such laws ever have binding legal force over

958. WALDRON, *supra* note 75, at 56.

959. U.S. CONST. art. I, § 7.

960. *See id.*; *see also* Scalia, *supra* note 821, at 13-14.

961. U.S. CONST. art. V.

962. HART, *supra* note 128, at 94-95 (explaining that a rule of recognition specifies those features of a rule that make it valid in a group).

963. *See id.*

964. *See* U.S. CONST. art. I, § 7; *id.* art. V.

965. WALDRON, *supra* note 75, at 15.

966. *Id.*

967. Dorsen, *supra* note 137, at 525 (quoting Justice Antonin Scalia).

American citizens? For this reason, it can be argued American courts should not utilize foreign law. One might argue that because the American people have not democratically approved foreign laws through the Article I or Article V processes, they do not possess legitimacy within the context of America's legal and political system under H.L.A. Hart's rule of recognition. At least, this practice may require stronger justification than the dubious wisdom of crowds.

A central premise of the U.S. Constitution is that sovereignty rests in "We the People of the United States."⁹⁶⁸ To better understand the significance of this, let us first examine the constitutional tradition of England that had developed there over several centuries, a tradition to which most Americans considered themselves heirs.⁹⁶⁹

Unlike the U.S. Constitution, the English Constitution is largely unwritten, as Professor Michael Stokes Paulsen et al. point out.⁹⁷⁰ It includes some important written documents, including the *Charter of Liberties of King Henry I in 1100*; the *Magna Carta in 1215*; the *Petition of Right of 1628*; the *Habeas Corpus Act of 1679*; the *English Bill of Rights of 1689*; and the *Act of Settlement of 1701*.⁹⁷¹ Although they serve as "elements" of the English Constitution, "none of these documents purported to establish a comprehensive, supreme written constitution as the definitive instrument of government. Nor did any of them recognize the sovereignty of We the People."⁹⁷² Indeed,

[p]arliamentary sovereignty arose out of the idea that the king, the House of Lords, and the House of Commons together represented all three of the great estates of the realm—the Monarchy, the Aristocracy, and the

968. U.S. CONST. pmbl.; see also MICHAEL STOKES PAULSEN ET AL., THE CONSTITUTION OF THE UNITED STATES 21 (2010) ("The premise of the written U.S. Constitution is the exact opposite of the premise of the current unwritten English Constitution. The written U.S. Constitution proceeds on the assumptions that sovereignty rests in We the People of the United States and that the federal government and all its officers—including the Congress, the president, and the justices of the Supreme Court—have limited and enumerated powers that flow directly from the people.").

969. PAULSEN ET AL., *supra* note 968, at 20.

970. For a more in-depth discussion on the unwritten British Constitution and its influence on the American written Constitution, see *id.* at 18-28.

971. *Id.* at 20 ("Before 1776, most Americans considered themselves Englishmen—heirs to a largely *unwritten* constitutional tradition that had emerged over centuries of history. That history, which included some important *written* documents, had, over time, led to certain settled understandings of the rightful powers of government and of the rights of individuals.").

972. *Id.*

Common People—and that together they were sovereign and could alter even the English Constitution.⁹⁷³

Together, the “King-in-Parliament” wielded total and absolute sovereignty and could alter even the English Constitution at will.⁹⁷⁴ What restrictions did exist on the King’s power existed by virtue of “agreements by the king to limit, or to restrain, what initially remained the sovereignty of the king”; though “later agreements embod[ied] the division of sovereignty between king and Parliament . . . they were never—as the Constitution of the United States would be—delegations of power made by the sovereign people.”⁹⁷⁵ The English customary Constitution set up “what . . . Aristotle and Polybius would have called a Mixed Regime.”⁹⁷⁶ It was partly monarchical, partly aristocratic, and partly democratic.⁹⁷⁷

On the other hand, “[t]he premise of the written U.S. Constitution is the exact opposite of the premise of the current unwritten English Constitution.”⁹⁷⁸ Under our Constitution, “We the People” are sovereign, and “the federal government and all its officers—including the Congress, the president, and the justices of the Supreme Court—have limited and enumerated powers that flow directly from the people.”⁹⁷⁹ Our Constitution reflects the idea that for a government action to possess legitimacy, it “must find [its] root in some grant of power from the People in the written Constitution.”⁹⁸⁰

The Constitution cannot be altered except by the procedures outlined in Article V,⁹⁸¹ even by “the president (Monarch?), the Senate and the Supreme Court (Aristocracy?), and the House of

973. *Id.* at 21.

974. *Id.* (“Parliamentary sovereignty arose out of the idea that the king, the House of Lords, and the House of Commons together represented all three of the great estates of the realm—the Monarchy, the Aristocracy, and the Common People—and that together they were sovereign and could alter even the English Constitution. Sovereignty in England is thus said to be vested in ‘The King-in-Parliament’—i.e., the king acting together with the House of Lords and the House of Commons.”). The authors note that “[b]ecause this traditional English regime included these three estates—the Monarchy, the Aristocracy, and the Common People—it was what political philosophers like Aristotle and Polybius would have called a Mixed Regime.” *Id.*

975. *Id.* at 20.

976. *Id.* at 21.

977. *Id.*

978. *Id.*

979. *Id.*

980. *Id.*

981. U.S. CONST. art. V.

Representatives (the Common People?) acting together as the three great estates of the American realm.”⁹⁸² The idea is that it is not theirs to alter; “the sovereignty of We the People predates the Constitution . . . and is supreme over it.”⁹⁸³ Whereas “these English constitutional documents purport to be the one supreme law of the land like the U.S. Constitution, and it is even doubtful whether most of them were enforceable in court,” Paulsen et al. say, the U.S. Constitution clearly “recognize[s] the sovereignty of We the People.”⁹⁸⁴ An English subject needed “to prove the existence of a right against the king and had no remedy at all against an Act of Parliament”; under the U.S. Constitution, in contrast, “the burden of proof was, in theory at least, placed on the federal government and its officers to show that they have authority to act.”⁹⁸⁵

The problem with the *ius gentium*, one might charge, is that it would undemocratically subject Americans to laws they have not chosen for themselves; it would impose on them a rule of foreign law that they do not like, nor want, nor select in violation of the sovereignty of “We the People.” This does not sound like democracy. In the Declaration of Independence, Jefferson declares that governments “deriv[e] their just powers from the consent of the governed”;⁹⁸⁶ his grievances against King George III include that “[h]e has combined with others to subject us to a jurisdiction foreign to our constitution, and unacknowledged by our laws; giving his Assent to their Acts of pretended Legislation.”⁹⁸⁷ Can consent of the governed be said to exist when the laws that bind a people have been imposed on them by an international judicial elite rather than selected by them through the democratic process?

To put this argument in context, a brief and necessarily incomplete survey of historical development of the concept of sovereignty follows. The modern notion of sovereignty as an important political characteristic of nation states arose after and because of the Protestant Reformation of the sixteenth century.⁹⁸⁸ Prior to that, there was in Western Europe a generally prevailing notion that the Pope was the natural arbiter of disputes among states and that he occupied a position of hierarchical supremacy over

982. PAULSEN ET AL., *supra* note 968, at 21.

983. *Id.* at 22.

984. *Id.* at 20.

985. *Id.* at 21-22.

986. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

987. *Id.* para. 15.

988. F.H. HINSLEY, SOVEREIGNTY 95 (1966).

kings.⁹⁸⁹ The idea of sovereign nation states with independent authority over their own geographic territory was not widely held. Instead, the distribution of authority was characterized by the quality of subsidiarity, with serfs owing allegiance to lords, who owed allegiance to kings, who owed allegiance to the Pope, who was subsidiary to God. There did not yet exist any real notion of the “divine right of kings,” or the idea that kings derive a right to rule directly from God and are not subject to earthly authority, which was an important point in the development of the concept of sovereignty. The kings of France and England were in some respects at least theoretically subsidiary to the Pope.⁹⁹⁰

One of the earliest proponents of the divine right of kings was the sixteenth-century French philosopher Jean Bodin, who asserted that God endowed kings with earthly authority.⁹⁹¹ In *Les Six Livres de la République*, Bodin wrote that “a sovereign prince . . . is answerable only to God,”⁹⁹² that “the prince [is] the image of God,”⁹⁹³ and that “there is nothing greater on earth, after God, than sovereign princes.”⁹⁹⁴ As such, Bodin reasoned, “a prince is not obligated by the common law of peoples any more than by his own edicts, and if the common law of peoples is unjust, the prince can depart from it in edicts made for his kingdom and forbid his subjects to use it.”⁹⁹⁵ Bodin also came up with the idea that sovereignty must be indivisible, housed all in one place.⁹⁹⁶ Bodin was thus an advocate of royal absolutism: “For if sovereignty is indivisible, as we have shown, how could it be shared by a prince, the nobles, and the people

989. See *id.* (“For the characteristic doctrine of Aquinas . . . was not the belief which created so many problems for the more extreme advocates of the various conflicting powers: the belief that some one of these powers was or ought to be the superior or the omni-competent authority. It was the denial that Christendom or any of its component communities harboured or required an authority of this kind. The Thomists denied such power to Pope and Emperor . . .”).

990. See, e.g., HINSLEY, *supra* note 988, at 109-11.

991. See generally JEAN BODIN, ON SOVEREIGNTY: FOUR CHAPTERS FROM *THE SIX BOOKS OF THE COMMONWEALTH* (Julian H. Franklin ed. & trans., 1992).

992. *Id.* at 4.

993. *Id.* at 45.

994. *Id.* at 46.

995. *Id.* at 45.

996. *Id.* at 50 (“Just as God, the great sovereign, cannot make a God equal to Himself because He is infinite and by logical necessity (*par demonstration necessaire*) two infinities cannot exist, so we can say that the prince, whom we have taken as the image of God, cannot make a subject equal to himself without annihilation of his power.”).

at the same time?”⁹⁹⁷ This individualistic conception of the king’s sovereignty, we feel, is inconsistent with feudalism, as well as with federalism, the division of authority across layers of government, and with the Aristotelian and Polybian idea of the “Mixed Regime.”⁹⁹⁸

The Scottish notion of the divine right of kings arose when the Protestant King James VI of Scotland, later King James I of England and Ireland, attempted to explain his natural right to rule rather than submit to alternative theories of legitimacy such as contractarianism.⁹⁹⁹ In *The Trew Law of Free Monarchies*, James asserted an absolutist view of monarchical rule under which kings could create new laws by royal prerogative, so long as he is mindful of tradition and God, who could “stirre vp such scourges as pleaseth him, for punishment of wicked kings.”¹⁰⁰⁰ According to James, “Kings are called Gods by the prophetical King *Dauid*, because they sit vpon GOD[’s throne on] earth, and haue the count of their administration to giue vnto him.”¹⁰⁰¹ James asserted that kings own their realms in the same way that feudal lords owned their fiefs, as kings arose “before any estates or rankes of men . . . before any Parliaments were holden, or lawes made: and by them was the land distributed (which at the first was whole theirs).”¹⁰⁰² For this reason, “it followes of necessitie, that the kings were the authors and makers of the Lawes, and not the Lawes of the kings.”¹⁰⁰³ In *Basilikon Doron*, King James I wrote that a king must “acknowledgeth himselfe ordained for his people, hauing receiued from God a burthen of gouernment, whereof he must be countable.”¹⁰⁰⁴

Hugo Grotius, a Dutch jurist of the sixteenth and seventeenth centuries, was also, like Bodin, an early proponent of the idea of sovereignty, although Grotius emphasized the role of the concept of

997. *Id.* at 92.

998. PAULSEN ET AL., *supra* note 968, at 21.

999. See James I, *The Trew Law of Free Monarchies: Or the Reciproock and Mvtvall Dvetic Betwixt a Free King and His Naturall Subjects*, in THE POLITICAL WORKS OF JAMES I (Charles Howard McIlwain ed., 1918) (1616), available at <http://www.perseus.tufts.edu/hopper/text?doc=Perseus%3Atext%3A1999.03.0071%3Asection%3D4%3Asubsection%3D2>.

1000. *Id.*

1001. *Id.* (footnote omitted).

1002. *Id.*

1003. *Id.*

1004. James I, *Of a Kings Dvetic in His Office: The Second Booke*, in THE POLITICAL WORKS OF JAMES I, *supra* note 999, available at <http://www.perseus.tufts.edu/hopper/text?doc=Perseus%3Atext%3A1999.03.0071%3Asection%3D3%3Asubsection%3D5>.

sovereignty in international law with respect to matters of war and peace, vis-à-vis the relations between nation states in a Westphalian global order.¹⁰⁰⁵ Grotius said that “[t]hat power is called sovereign, whose actions are not subject to the controul of any other power, so as to be annulled at the pleasure of any other human will.”¹⁰⁰⁶ “The term any other human will exempts the sovereign himself from this restriction, who may annul his own acts, as may also his successor, who enjoys the same right, having the same power and no other.”¹⁰⁰⁷ Grotius believed that some states are of a natural disposition “to obey [rather] than to govern,” while “sometimes a state is so situated, that it seems impossible it can preserve its peace and existence, without submitting to the absolute government of a single person.”¹⁰⁰⁸ Thus, “as property may be acquired by what has been already styled just war, by the same means the rights of sovereignty may be acquired.”¹⁰⁰⁹ Grotius rejected social contract theory, noting that “though guardianships were invented for the benefit of wards, yet the guardian has a right to authority over the ward. Nor, though a guardian may for mismanagement be removed from his trust, does it follow that a king may for the same reason be deposed.”¹⁰¹⁰ Like Bodin, Grotius believed in virtually absolute sovereignty,¹⁰¹¹ though not necessarily always monarchical sovereignty.¹⁰¹² Notably, however, he appears to recognize the concept of popular sovereignty in distinguishing between usufructuary kingdoms, in which the king owns neither the land nor the subjects, but rules in accordance with conditions imposed upon him by the people, and patrimonial kingdoms, in which the land and subjects are the personal property

1005. HINSLEY, *supra* note 988, at 138-39.

1006. HUGO GROTIUS, *THE RIGHTS OF WAR AND PEACE* bk. I, at 62 (A.C. Campbell trans., 1901) (1625).

1007. *Id.* (emphasis omitted).

1008. *Id.* at 64.

1009. *Id.* at 64-65.

1010. *Id.* at 68. Grotius also rejects “an imaginary kind of mutual subjection, by which the people are bound to obey the king, as long as he governs well; but his government is subject to their inspection and controul,” and denies “a right [on the part of the people] to any controul over the Prince’s conduct in his lawful government.” *Id.* at 69.

1011. *Id.* at 103-04 (“The sovereignty therefore, not only over subjects at home, but over those in the prince’s foreign dominions passes with the hereditary descent of the crown.”).

1012. *Id.* at 65 (“Nor is the term sovereignty here meant to be applied to monarchy alone, but to government by nobles, from any share in which the people are excluded.”).

of the king, who rules absolutely.¹⁰¹³ In our opinion, the former are not exactly characterized by democratic self-government, but they do have some semblance of popular and constitutional rule, at least compared to patrimonial kingdoms.

The famous English political philosopher Thomas Hobbes introduced the idea of indivisible sovereignty to England with *Leviathan*, published in 1651.¹⁰¹⁴ Thomas Hobbes's formulation of the idea of indivisible sovereignty was notable because it constituted a significant step toward overcoming the problem that had defeated previous theorists: reconciling absolute sovereignty with the rights of "the People."¹⁰¹⁵ Philosophers such as Anthony Ascham, John Rockett, and Henry Parker argued that the legitimacy of a government is dependent "not on any *a priori* views about the source of political authority but on the existence of a 'a mutual relation of Protection and Allegiance,'" or that so long as the governing entity exercised power effectively they should be obeyed, and that this "'mutual relation'" gave the ruling power the legal authority for all lawmaking for the political society.¹⁰¹⁶ They held that the exact identity of the ruler was less important than his possession of absolute and indivisible sovereign power, and that disputes over who in a regime was the holder of sovereignty "were of merely tactical significance."¹⁰¹⁷

The novelty of Hobbes's argument was not just that it denied all rights of "the People," but that it denied the existence of a collective personality of "the People" altogether.¹⁰¹⁸ Hobbes completely abandoned the conception of a contract between the ruler and the ruled allowing the latter to hold the former accountable for behavior,¹⁰¹⁹ insisting instead that sovereignty must be made wholly indivisible and must be held in the hands of the ruler, rather than the people, lest there be "*bellum omnium contra omnes*," or war of all against all.¹⁰²⁰ Hobbes believed that "[t]o divide sovereign power is to create rival sovereigns and, thus, inevitably to initiate the kind of

1013. *Id.* at 71-72.

1014. THOMAS HOBBS, *LEVIATHAN* 84 (J.C.A. Gaskin ed., Oxford Univ. Press 1996) (1651).

1015. HINSLEY, *supra* note 988, at 142.

1016. *Id.* at 141.

1017. *Id.*

1018. *Id.* at 142.

1019. *Id.*

1020. CARL SCHMITT, *POLITICAL THEOLOGY: FOUR CHAPTERS ON THE CONCEPT OF SOVEREIGNTY* 8-9 (George Schwab trans., Univ. of Chicago Press ed. 2005) (1922).

strife that civil society is supposed to remedy and prevent.”¹⁰²¹ Thus, his “argument for the indivisibility of sovereignty” led him to “an utter rejection of any notion of a mixed regime.”¹⁰²² Hobbes was greatly affected by the English Civil War,¹⁰²³ a brutal conflict between Parliamentarians (Roundheads) and the Royalists (Cavaliers), in which huge numbers of the English, Scottish, and Irish populations perished.¹⁰²⁴ He “blame[d] Charles I’s councilors for legitimating the principle of mixed [regime] in the pre-civil war period,”¹⁰²⁵ and believed that “a mixed government is no government at all.”¹⁰²⁶ According to Hobbes, strong, centralized, authoritarian leadership was needed to prevent warfare and suffering:

In such condition, there is no place for industry; because the fruit thereof is uncertain: and consequently no culture of the earth; no navigation, nor use of the commodities that may be imported by sea; no commodious building; no instruments of moving, and removing such things as require much force; no knowledge of the face of the earth; no account of time; no arts; no letters; no society; and which is worst of all, continual fear, and danger of violent death; and the life of man, solitary, poor, nasty, brutish, and short.¹⁰²⁷

The purpose toward which men endeavor in establishing statehood, Hobbes believed, was

the foresight of their own preservation, and of a more contented life thereby; that is to say, of getting themselves out from that miserable condition of war, which is necessarily consequent (as hath been

1021. LEE WARD, *THE POLITICS OF LIBERTY IN ENGLAND AND REVOLUTIONARY AMERICA* 96 (2004).

1022. *Id.*

1023. HINSLEY, *supra* note 988, at 149.

1024. Precise casualty estimates are difficult to calculate, and there may be unreliability in estimates that do exist. CHARLES CARLTON, *GOING TO THE WARS: THE EXPERIENCE OF THE BRITISH CIVIL WARS, 1638-1651*, at 211-14 (1994). That being said, it is estimated that the English Civil War resulted in a roughly 3.7% population loss in England, a 6% population loss in Scotland, and a 41% population loss in Ireland. *Id.* at 214.

1025. WARD, *supra* note 1021, at 96. *See generally* Corrine Comstock Weston, *The Theory of Mixed Monarchy Under Charles I and After*, 75 *ENG. HIST. REV.* 426 (1960). (“[A]fter the outbreak of the civil war, both sides asserted that law-making belonged jointly to king, lords, and commons, a point of view that he considered closely associated with the idea of mixed monarchy. The metamorphosis in public opinion, which Dr. Hinton called attention, was due in large measure to the fact that just before the civil war began, Charles I publicly applied the theory of mixed monarchy to the English constitution and in this way gave the theory a vogue that could have been acquired so rapidly in no other way.”). *Id.* at 427.

1026. WARD, *supra* note 1021, at 96.

1027. HOBBS, *supra* note 1014, at 84.

shown . . .) to the natural passions of men, when there is no visible power to keep them in awe, and tie them by fear of punishment to the performance of their covenants.¹⁰²⁸

When the monarchy was restored after the interregnum of Oliver Cromwell, King Charles II, an ally and financial beneficiary of the French King Louis XIV, gave Hobbes a pension.¹⁰²⁹

When King James II was overthrown in the Glorious Revolution of 1688, Parliament invited William and Mary to ascend to the English throne and passed the English Bill of Rights,¹⁰³⁰ which Jon Kenyon calls “one of the great founding documents of Western-style democracy.”¹⁰³¹ Paulsen et al. write that English rule was characterized as a “Mixed Regime,” where power was exercised jointly by the monarchy, the House of Lords, and the House of Commons.¹⁰³² “Parliamentary sovereignty,” they note, “arose out of the idea that the king, the House of Lords, and the House of Commons *together* represented all three of the great estates of the realm . . . and that *together* they were sovereign and could alter even the English Constitution.”¹⁰³³ The emphasis here is on the idea that sovereignty rested in the three estates “together”—not the king alone.¹⁰³⁴ In the eighteenth century, William Blackstone wrote *Commentaries on the Laws of England*, a broad treatise on English common law and constitutionalism, attempting to reconcile the Hobbesian idea of indivisible sovereignty with the real life practice of the English “Mixed Regime” by saying that absolute sovereignty lies with the “King in Parliament,” or in the Crown, the House of Lords, and the House of Commons acting in concert.¹⁰³⁵ By the eighteenth century, the supremacy of the Crown-in-Parliament had established itself as the dominant conceptual framework of British

1028. *Id.* at 111.

1029. A.P. MARTINICH, HOBBS: A BIOGRAPHY 294-95 (1999).

1030. John Kenyon, *1688 Remembered: The Glorious Revolution and the American Constitution*, in THE WORLD OF WILLIAM AND MARY: ANGLO-DUTCH PERSPECTIVES ON THE REVOLUTION OF 1688-89, at 118, 119 (Dale Hoak & Mordechai Feingold eds., 1996). Kenyon notes that it is still debated whether “William’s acceptance of this document [the Bill of Rights] was a condition of accession to the throne or merely a commentary on it.” *Id.*

1031. *Id.*

1032. PAULSEN ET AL., *supra* note 968, at 21.

1033. *Id.* (emphasis added).

1034. *Id.*

1035. Blackstone refers to the “king in parliament” on at least two occasions. See 1 WILLIAM BLACKSTONE, COMMENTARIES *220, *275.

politics.¹⁰³⁶ Over time of course, Kings grew more irrelevant until they ultimately did become ciphers, and the House of Lords eventually followed suit, so that in practice today the House of Commons exercises nearly full sovereignty.¹⁰³⁷

During the 1500s, France experienced significant conflict between Protestants and Catholics, including civil warfare prior to the coming to power of King Henry IV.¹⁰³⁸ Though King Henry had been a Protestant, he converted to Catholicism in order to conquer Paris, his thinking reflected by the apocryphal quip “Paris vaut bien une messe”—“Paris is well worth a [m]ass.”¹⁰³⁹ Later, King Louis XIV would take the notion of divine right of kings to the absolutist extreme: “French Parliaments were . . . subjected to vigorous repression at the hands of the king; they were stripped of their political power”¹⁰⁴⁰ while the king also asserted independence from the Pope’s authority in temporal matters through the 1682 Declaration of the clergy of France.¹⁰⁴¹ King Louis’s outlook that he possessed absolute sovereignty in France is well expressed by the apocryphal, though oft-quoted, remark “*L’État, c’est moi*”¹⁰⁴²—“I am the State.” This is the man who helped indirectly to pay for Thomas Hobbes’s retirement by secretly funding King Charles II of England.

In the thirteen colonies that would become United States, “there existed only Mixed Regimes of the One, the Few, and the Many” until 1787.¹⁰⁴³ Generally, power was divided “horizontally between royal governors and the popularly elected lower houses of colonial legislatures and vertically between the imperial government in London and the colonial governments in the thirteen original colonies.”¹⁰⁴⁴ In 1787, however, the U.S. Constitution made clear in

1036. HINSLEY, *supra* note 988, at 152.

1037. PAULSEN ET AL., *supra* note 968, at 21.

1038. See generally JAMES WESTFALL THOMPSON, *THE WARS OF RELIGION IN FRANCE 1559-1576: THE HUGUENOTS* CATHERINE DE MEDICI AND PHILIP II (1909).

1039. Edmund H. Dickerman, *The Conversion of Henry IV: “Paris Is Well Worth a Mass” in Psychological Perspective*, 63 CATH. HIST. REV. 1, 1 (1977) (“[T]he quip ‘Paris is well worth a Mass,’ while apocryphal, accurately reflected Henry’s thinking.”).

1040. JAMES BRECK PERKINS, *FRANCE UNDER THE REGENCY WITH A REVIEW OF THE ADMINISTRATION OF LOUIS XIV* 312 (3d ed. 1892).

1041. J.P. Sommerville, *Absolutism and Royalism*, in *THE CAMBRIDGE HISTORY OF POLITICAL THOUGHT 1450-1700*, at 347, 347 (J.H. Burns & Mark Goldie eds., 1991).

1042. MICHAEL MOULD, *THE ROUTLEDGE DICTIONARY OF CULTURAL REFERENCES IN MODERN FRENCH* 52 (2011).

1043. PAULSEN ET AL., *supra* note 968, at 201.

1044. *Id.* at 25.

its Preamble that indivisible sovereignty in the United States was in the hands of “We the People.”¹⁰⁴⁵ The will of the sovereign people, filtered through that of the Framers, who “hated concentrations of government power,” was expressed through a complex system of “checks and balances, separation of powers, bicameralism, and federalism [that] sought to preserve liberty by making it hard for government to act.”¹⁰⁴⁶ France in 1789 had its own revolution, but it gave absolute sovereignty first to the National Assembly and then to the Emperor Napoleon. This proved over time to be a catastrophic mistake.

One may argue that acceptance of foreign law, as being in any way binding, would violate the indivisible sovereignty of “We the People.” It is fair to say that when U.S. courts enforce the Constitution using the power of judicial review, they are checking “We the People’s” laws against “We the People’s” Constitution, which is the supreme law.¹⁰⁴⁷ If courts were to start invalidating U.S. laws based on binding foreign law decisions, would they infringe on the indivisible sovereignty of We the American People?

“‘[W]e *don’t* have the same moral and legal framework as the rest of the world, and never have,’” says Justice Scalia.¹⁰⁴⁸ In the Eighth Amendment context, he says, judges should look to “‘[t]he standards of decency of *American* society—not the standards of decency of the world, not the standards of decency of other countries that don’t have our background, that don’t have our culture, that don’t have our moral views.’”¹⁰⁴⁹ Other nations “may be willing to prostitute their legal traditions, but we shouldn’t give up our sovereignty so easily.”¹⁰⁵⁰ Waldron acknowledges the sovereign nation-state problem with his *ius gentium* theory, but we feel he fails to sufficiently address it.

1045. U.S. CONST. pmbl. The preamble states that the ones who “ordain and establish this Constitution for the United States of America” are “We the People.” *Id.* We think it is self-evidently true that the ordainment and establishment of a constitution is inherently an assertion of sovereignty.

1046. Steven G. Calabresi & Joan L. Larsen, *One Person, One Office: Separation of Powers or Separation of Personnel?*, 79 CORNELL L. REV. 1045, 1047 (1994).

1047. *See generally* CHARLES L. BLACK, JR., *THE PEOPLE AND THE COURT: JUDICIAL REVIEW IN A DEMOCRACY* (1960).

1048. Dorsen, *supra* note 137, at 521 (quoting Justice Antonin Scalia).

1049. *Id.* at 526 (quoting Justice Antonin Scalia).

1050. WALDRON, *supra* note 75, at 20-21 (internal quotation marks omitted).

E. Perceived Incompatibility with Originalism

Finally, the citation of foreign law is said to be inconsistent with the practice of originalism.¹⁰⁵¹ Justice Scalia's objection to the citation of the legal materials from other sovereign, foreign nation states has already been noted.¹⁰⁵² Faithful originalists must consider the arguments for the *ius gentium* and wonder "why a poll of United Nations members today has any bearing on the meaning of a constitutional text that James Madison drafted in 1791."¹⁰⁵³ Posner and Sunstein acknowledge as much, admitting that if it is "correct to think that originalism, by itself, excludes reference to foreign precedents[, and] if the Constitution means what it originally meant, the contemporary practices of foreign nations are usually immaterial."¹⁰⁵⁴ Elsewhere, they write that "originalists might not be especially concerned about the practices of other courts in other nations, because those practices would not bear on the Constitution's original meaning."¹⁰⁵⁵

Rosenkranz argues that

[t]he notion of unelected judges updating the Constitution to reflect their own evolving view of good government is troubling to some, in itself. But the notion that this evolution may be brought about by changes in foreign law raises even deeper issues of democratic self-governance. Again, to put the point most sharply, when the Supreme Court declares that the Constitution evolves, and declares further that foreign law effects [sic] its evolution, it is declaring nothing less than *the power of foreign governments to change the meaning of the U.S. Constitution*.¹⁰⁵⁶

Article V already provides for a means for instigating constitutional change; foreign judges should not perform this task.¹⁰⁵⁷

1051. See Dorsen, *supra* note 137, at 525 ("Now, my theory of what to do when interpreting the American Constitution is to try to understand what it meant, what it was understood by the society to mean when it was adopted. . . . It should be easy to understand why, for someone who has my theory of interpretation, why foreign law is irrelevant.") (quoting Justice Antonin Scalia)); *Roper v. Simmons*, 543 U.S. 551, 608 (2005) (Scalia, J., dissenting).

1052. See Dorsen, *supra* note 137, at 525.

1053. Easterbrook, *supra* note 72, at 224.

1054. Posner & Sunstein, *supra* note 71, at 137 (footnote omitted).

1055. Eric A. Posner & Cass R. Sunstein, *Response—On Learning from Others*, 59 STAN. L. REV. 1309, 1310 (2007).

1056. Rosenkranz, *supra* note 135, at 1304 (footnotes omitted).

1057. U.S. CONST. art. V.

VI. RESPONSES TO CRITICISMS

In Part V, we examined some of the objections that might be raised against Waldron's idea of the *ius gentium*, as supplemented by us with the concept of Hayekian spontaneous orders. In this Part, we attempt to respond to the extent we can to the objections we just discussed.

A. Drawing the Lines

In the last Part, we posed some difficult questions that any proponent of the *ius gentium* must address in some way or another, including knowing how to create practical rules and guidelines for American judges to follow when citing the law of other foreign, sovereign nation states. In his book, Waldron offers some suggestions for how judges should evaluate foreign legal materials when a "consensus that is less than 100 percent" exists on a given issue.¹⁰⁵⁸ Now, we will take the opportunity ourselves to offer additional general, common-sense guidelines to which American judges should adhere when or if they find themselves citing foreign sources of law, notwithstanding all the arguments just made against that practice.

Our rules are not—*not*—hard and fast rules. There is no magical formula; these suggestions are standards and principles rather than rules, and should not be applied rigidly or in all cases. Furthermore, each proceeds on the assumption of *ceteris paribus*. A wise judge may conceivably find compelling reasons to assign less weight to one country's court rulings than another even if the first is more politically open. Likewise, we suggest that there are no mathematical constants of correlation; an increase in population size of magnitude *X* does not result in *Y* degrees more judicial credibility. Nonetheless, we believe that general observance of these guidelines will tend to yield better judicial results.

First, we suggest that, all other things being equal, foreign judicial decisions that are cited or discussed should at least be weighted proportionately to the size of the population of the democratic countries from which they originate. A large population is by no means a guarantee of a wise legal regime—China has the world's largest population at over 1.3 billion and yet is far more

1058. WALDRON, *supra* note 75, at 187. Waldron shares some suggestions at *id.* at 187-220.

repressive than the United States in terms of civil, political, and economic rights.¹⁰⁵⁹ However, we believe there is a fairly compelling argument for this rule simply on the basis of democratic legitimacy. When a greater proportion of the global population lives under a legal regime, we think it may merit heightened consideration in judicial deliberations within the *ius gentium*. If the *ius gentium* is to represent “the legal wisdom of the world,” it makes sense that those countries, which have larger populations and are democracies, and thus arguably have more “legal wisdom” to share, should have a stronger voice.¹⁰⁶⁰

Second, we believe that, other factors aside, judges should prefer to look to countries with legal regimes that promote the prosperity and well-being of their people. One obvious measure of prosperity is, of course, GDP per capita; court opinions from countries with larger, rather than smaller, GDPs per capita should be paid somewhat more respect. There is something to be said for the inherent wisdom and goodness of a legal regime that is associated with greater prosperity and higher standards of living.¹⁰⁶¹ If the *ius gentium* has any interest maximizing “public welfare,”¹⁰⁶² GDP per capita is certainly as good a metric of this quality to employ. It seems to make more sense, after all, for courts to cite opinions from Argentina, which in 2010 saw a real GDP growth rate of 7.5%, than Bulgaria, which in 2010 experienced real GDP growth of only 0.3%.¹⁰⁶³ But, obviously, GDP per capita is not the only measure of well-being, or even necessarily the best. The Organisation for Economic Co-operation and Development, for instance, measures quality of life using a holistic index that accounts for environment, life satisfaction, safety, work-life balance, and community, among other metrics.¹⁰⁶⁴ Countries that seek to maximize utility face trade-offs between competing values; some countries may prefer more leisure time or less stress for lower economic growth.¹⁰⁶⁵ Because there is nothing wrong with this, we believe the use of GDP per

1059. *Population Comparison*, *supra* note 912.

1060. WALDRON, *supra* note 75, at 188.

1061. *Cf.* Mahoney, *supra* note 437 (discussing the economic-growth-promoting nature of the common law).

1062. WALDRON, *supra* note 75, at 99.

1063. *See* THE WORLD FACTBOOK 2011, at 34, 104 (2011).

1064. OECD BETTER LIFE INDEX, <http://www.oecdbetterlifeindex.org/> (last visited Feb. 23, 2015).

1065. *Cf.* Christopher Rhoads, *Europe's Prized Leisure Life Becomes Economic Obstacle*, WALL ST. J. (Aug. 8, 2002, 12:01 AM), <http://online.wsj.com/news/articles/SB1028753249194799400>.

capita should be supplemented by non-market measures of happiness and welfare as well.

Third, the weight assigned to court decisions from countries that have poor human rights records or that regularly deny their citizens basic social, political, and economic opportunity should be discounted accordingly. Again, the purpose of the *ius gentium* is to harness the collective private knowledge of the many countries of the world.¹⁰⁶⁶ One may question the wisdom that emanates from regimes that oppress their own people and intimidate their neighbors. In Saudi Arabia, “[d]etainees, including children, commonly face systematic violations of due process and fair trial rights, including arbitrary arrest, and torture and ill-treatment in detention. Saudi judges routinely sentence defendants to hundreds of lashes.”¹⁰⁶⁷ In North Korea, “the government represses all forms of freedom of expression and opinion and does not allow any organized political opposition, independent media, free trade unions, civil society organizations, or religious freedom.”¹⁰⁶⁸ We would not want to emulate these nations’ lead on human rights issues. The spontaneous order that the *ius gentium* represents would likely only be polluted by the “knowledge” that such nations might contribute.

Fourth, we think it is appropriate if nations choose to pay relatively greater heed to the judgments of nations with legal systems that are more like their own. We expect that the challenges faced by countries with legal regimes similar to our own are likelier to resemble those that will confront this country. If, as Justice Breyer argues, the purpose of looking to foreign law for guidance is to learn how in a difficult case facing a U.S. court a “human being called a judge, though of a different country, has had to consider a similar problem,”¹⁰⁶⁹ it seems that the educational value of such knowledge is greater the more similar the two countries are. “[W]hat is at issue[is] [t]o what extent will learning what happens in other courts help a judge apply the Constitution of the United States,” Justice Breyer says.¹⁰⁷⁰ “[I]n today’s world where similar relevant experience becomes more and more common we are more likely to

1066. See *supra* note 89 and accompanying text.

1067. HUMAN RIGHTS WATCH, WORLD REPORT 2014: EVENTS OF 2013, at 601 (2014), available at http://www.hrw.org/sites/default/files/wr2014_web_0.pdf.

1068. *Id.* at 361.

1069. Dorsen, *supra* note 137, at 523 (quoting Justice Stephen Breyer).

1070. *Id.* at 537 (quoting Justice Stephen Breyer).

learn from other countries.”¹⁰⁷¹ We think this would be truer for countries that are in relevant ways more like our own.

For example, the right to silence has come before the courts of several common law nations.¹⁰⁷² In the United States, the Supreme Court in *Miranda v. Arizona* found that the privilege against self-incrimination required law enforcement officers to notify suspects in custody of their rights to remain silent and obtain an attorney before interrogation.¹⁰⁷³ In *Griffin v. California*, the Supreme Court ruled that a defendant’s refusal to testify cannot be construed by a judge or prosecutor as evidence of guilt.¹⁰⁷⁴ In 1990, the Supreme Court of Canada issued a similar judgment when the issue of self-incrimination came before it, finding in *R. v. Hebert* that the right to silence is a principle of fundamental justice and cannot be subverted through law-enforcement subterfuge.¹⁰⁷⁵ In 1978, the India Supreme Court also declared a right against self-incrimination in *Satpathy v. Dani*.¹⁰⁷⁶

Many common law countries also confront the issues of restrictions on admissible evidence, especially whether or not to adopt the exclusionary rule.¹⁰⁷⁷ The U.S. Supreme Court established the exclusionary rule at the federal level in the 1914 case *Weeks v. United States*,¹⁰⁷⁸ the Warren Court extended that rule to the states in the 1961 case *Mapp v. Ohio*.¹⁰⁷⁹ New Zealand followed suit in *Edwards v Police*, in which the court acquitted a man arrested on his own property for operating a motorbike while intoxicated because the arrest had been unlawful, and thus the blood test to which he had consented following that unlawful arrest was inadmissible.¹⁰⁸⁰

Another issue that confronts common law nations is whether defendants possess a right to have counsel provided by the state when they are unable to obtain representation themselves.¹⁰⁸¹ The U.S. Supreme Court established a right to counsel in the 1963 decision *Gideon v. Wainwright*,¹⁰⁸² while the Canadian Supreme

1071. *Id.* (quoting Justice Stephen Breyer).

1072. *See infra* notes 1072-75.

1073. 384 U.S. 436, 444 (1966).

1074. 380 U.S. 609, 615 (1965).

1075. [1990] 2 S.C.R. 151, 181, 184-85 (Can.).

1076. (1978) 3 S.C.R. 608, 623-24 (India).

1077. *See infra* notes 1077-79.

1078. 232 U.S. 383, 398 (1914).

1079. 367 U.S. 643, 660 (1961).

1080. [1994] 2 NZLR 164 (HC) 167, 173-74.

1081. *See infra* notes 1081-83.

1082. 372 U.S. 335, 343-44 (1963).

Court did so in the 1995 case, *R. v. Burlingham*.¹⁰⁸³ However, in 1995 the South African Supreme Court explicitly declined to declare an absolute right to counsel in *State v. Vermaas* and in *S v. Du Plessis*, calling itself “ill equipped for the factual findings and assessments which the enquiry entails” and saying that “[s]uch a decision is pre-eminently one for the judge trying the case.”¹⁰⁸⁴

We should note that the U.S. Constitution differs from “the monism of the British Westminster [sic] form” of parliamentary government because of our presidential, separation of powers, judicial review tradition,¹⁰⁸⁵ and our rejection of the whole concept of indivisible parliamentary sovereignty.¹⁰⁸⁶ Because we believe that “existence of presidentialism and of the separation of powers in our Constitution is a praiseworthy feature of the document that should [sometimes] be emulated abroad,”¹⁰⁸⁷ perhaps in this respect the French and Latin American constitutions are more relevant to us than are other common law analogues.¹⁰⁸⁸ We do, however, share a tradition of constitutional federalism with Canada,¹⁰⁸⁹ Australia,¹⁰⁹⁰ India,¹⁰⁹¹ and Germany.¹⁰⁹² We believe Americans can learn something of value about federalism from looking at foreign law.

Our fifth guideline is the one we believe to be most important for American judges to mind as they deliberate using foreign sources of law. American courts should rely to a greater extent on decisions reached by courts that are more open and responsive to the democratic sentiments of their people. It seems to us fair to say that courts possess democratic legitimacy in proportion to their democratic accountability. First, one criticism levied against the *ius gentium* is that it lacks democratic authority; as Justice Scalia says, “I doubt whether anybody would say, ‘Yes, we want to be governed by the views of foreigners.’”¹⁰⁹³ A rule specifying that rulings by more democratic courts be accorded greater stature in American

1083. [1995] 2 S.C.R. 206, 207 (Can.).

1084. 1995 (3) SA 292 (CC) at para. 15 (S. Afr.).

1085. See Steven G. Calabresi, *The Virtues of Presidential Government: Why Professor Ackerman Is Wrong to Prefer the German to the U.S. Constitution*, 18 CONST. COMMENT. 51, 54 (2001).

1086. PAULSEN ET AL., *supra* note 968, at 21.

1087. Calabresi, *supra* note 1085, at 52.

1088. See *id.* at 52-53.

1089. See *id.* at 88.

1090. See *id.* at 85.

1091. See *id.* at 88-89.

1092. See *id.* at 86.

1093. Dorsen, *supra* note 137, at 522.

judicial deliberations could help counterbalance the problems posed by this lack of democracy. Second, we believe legitimacy of the *ius gentium* is due to the fact that it meets all four of Surowiecki's conditions for crowd wisdom: It is a consensus formed among a large and diverse group of people whose opinions are formed independently, and courts can successfully aggregate this information.¹⁰⁹⁴ Thus, we expect that a democratically responsive court would be more successful in integrating information from a multitude of backgrounds rather than just the social elites or the ruling regime.

All other things being equal, it makes sense for American courts to give more weight to opinions issued by the French or Japanese constitutional courts—whose appointees are superannuated government figures well known to the public through their political service and can thus be considered somewhat democratically accountable—than those of the India Supreme Court—whose appointees play a role in selecting their own replacements.¹⁰⁹⁵ We feel that the manner in which foreign judges are appointed is somewhat relevant to the degree of weightiness we should give their decisions. We also feel that the decisions of foreign constitutional courts should be given more weight than those of lower courts because a constitutional court ruling reflects the settled legal judgment of a particular society in a way that a lower-court ruling does not. However, it may still be appropriate to cite lower-court rulings in circumstances where the questions they consider are typically not encountered in rulings of higher courts, perhaps because they are usually settled at a lower level.

Obviously, the list of rules we have offered is far from exclusive and should serve as only a rough suggestion. Indeed, a precise, mathematical application of them would be close to impossible. They may contradict one another in particular applications. Anyone looking for sharp, rule-like directives will be disappointed. At best, these rules are guidelines for American judges navigating the landscape of the law of foreign sovereign nation states on whether to cite such law or read it. Can unscrupulous judges misuse these rules to “look[] over a crowd and pick[] out . . . friends,” as the late Judge Harold Levanthal said?¹⁰⁹⁶ To cherry-pick

1094. SUROWIECKI, *supra* note 115, at 10.

1095. See Clarke, *supra* note 811, at 109-18.

1096. Patricia M. Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 IOWA L. REV. 195, 214 (1983) (quoting Judge Harold Levanthal).

foreign decisions that support the positions they wish to take?¹⁰⁹⁷ Of course. But judges can already choose between sister-state or sister-circuit precedents and whether or how to distinguish cases before them from existing precedent. As Posner and Sunstein noted, the practice of state courts citing one another's law is hardly uncommon.¹⁰⁹⁸ "[I]f you're just going to pick out the ideas and reasoning that you like, if you're going to shove them in[to] your opinions, and give what you wrote decoration, well, that's dishonest," said Michael Kirby, a former judge of the High Court of Australia.¹⁰⁹⁹ "If judges want to be dishonest, then they'll be dishonest."¹¹⁰⁰

B. Economic Arguments for Greater Centralization

We previously listed four economic arguments for federalism that seem to argue against the existence of the *ius gentium*.¹¹⁰¹ The citation of foreign law is obviously an area where America needs to tread carefully; we are not suggesting that we should cite the law of other nations in all matters. First, though, it is undoubtedly true that the *ius gentium* allows American courts to capitalize on the tendency of foreign legal systems, in the words of Sandra Day O'Connor, "to innovate, to experiment, and to find new solutions to the new legal problems that arise each day."¹¹⁰² Even while arguing against the domestic citation of foreign law generally, Richard Posner candidly acknowledges that "[j]ust as our states are laboratories for social experiments from which other states and the federal government can learn, so are foreign nations laboratories from whose legal experiments we can learn."¹¹⁰³

1097. *See id.*

1098. Posner & Sunstein, *supra* note 71, at 133-35.

1099. John M. Greaney, Michael Kirby & Eric Blumenson, *Panel Discussion on Citation of Foreign Decisions in Constitutional Adjudication*, 43 SUFFOLK U. L. REV. 135, 153 (2009).

1100. *Id.*

1101. *See supra* Section V.B.

1102. *See* SANDRA DAY O'CONNOR, THE MAJESTY OF THE LAW: REFLECTIONS OF A SUPREME COURT JUSTICE 234 (Craig Joyce ed., 2003).

1103. Richard Posner, *No Thanks, We Already Have Our Own Laws: The Court Should Never View a Foreign Legal Decision as a Precedent in Any Way*, LEGAL AFF., July-Aug. 2004, at 40, 42, available at http://www.legalaffairs.org/issues/July-August-2004/feature_posner_julaug04.msp.

Moreover, arguments based on the economics of federalism cut two ways.¹¹⁰⁴ There are at least four powerful economics-of-federalism arguments that may sometimes counsel in favor of international uniformity that should be taken into account alongside those against it. The first is that individual nations, like American states, face at least some “collective action problems with respect to [but not necessarily limited to]: (1) war and foreign affairs; (2) free trade; (3) correcting externalities imposed by state action; and (4) reaping the benefits of economies of scale,”¹¹⁰⁵ that we feel are best addressed by the existence of international rules. Citing foreign law could in theory help address collective-action problems presented by different standards in international criminal law or tax law—namely, the need to stop races to the bottom.¹¹⁰⁶ Tax law has already created such a race to the bottom: The IRS devotes extensive resources to cracking down on abusive tax shelters, as some nations compete to serve as tax shelters for individuals and corporations.¹¹⁰⁷ Meanwhile, the Supreme Court’s 2013 opinion for *Kiobel v. Royal Dutch Petroleum Co.*¹¹⁰⁸ may have sharply limited the ability of foreign plaintiffs to “bring suits in U.S. courts against other foreigners, for human rights violations in foreign countries,”¹¹⁰⁹ but we feel it also raises the question of whether greater global uniformity in criminal law norms is needed to prevent opportunistic litigation. Perhaps fewer such suits would be filed if comparative criminal law provided greater consistency in dealing with criminal offenses.

Another collective-action problem that may call for the creation of stronger international legal norms may be the “version of legal hell” that Professors Jack Goldsmith and Tim Wu say is promised by “[t]erritorial control of the Internet”—“a world of Singaporean free speech, American tort law, Russian commercial regulation, and

1104. As is true with American federalism. See Calabresi & Terrell, *supra* note 160, at 6, 32.

1105. *Id.* at 42.

1106. See *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013).

1107. See *Abusive Tax Shelters and Transactions*, IRS, <http://www.irs.gov/Businesses/Corporations/Abusive-Tax-Shelters-and-Transactions> (last updated Jan. 16, 2015).

1108. 133 S. Ct. 1659.

1109. Eric Posner, *The United States Can’t Be the World’s Courthouse: Why the Supreme Court Just Killed Off a Whole Category of Human Rights Suits*, SLATE (Apr. 24, 2013, 2:56 PM), http://www.slate.com/articles/news_and_politics/view_from_chicago/2013/04/the_supreme_court_and_the_alien_tort_statute_ending_human_rights_suits.html.

Chinese civil rights.”¹¹¹⁰ Freedom of speech, to offer one example, may need global protection so that censorious countries such as Iran,¹¹¹¹ Syria,¹¹¹² and China¹¹¹³ cannot unilaterally shut down speech most of the world wants to receive.¹¹¹⁴

1110. JACK GOLDSMITH & TIM WU, WHO CONTROLS THE INTERNET?: ILLUSIONS OF A BORDERLESS WORLD 7 (2006).

1111. Following the 2009 elections, Iran began increasing its monitoring of citizens’ Internet activities, especially on online social networks such as Facebook. Farnaz Fassihi, *Iranian Crackdown Goes Global*, WALL ST. J., Dec. 3, 2009, at A1. Citizens who have lived abroad have found their relatives back home interrogated and/or detained by Iranian authorities because of the contents of their Facebook pages. *Id.* The Iranian government has announced plans to create a “Halal Internet” that will be highly monitored by state authorities. Ty McCormick, *Is Iran About to Seal Itself Off from the Internet?*, FOREIGN POL’Y (Apr. 30, 2013, 12:00 AM), http://blog.foreignpolicy.com/posts/2013/04/29/is_iran_about_to_cut_off_access_to_the_internet. According to Reporters Without Borders’ 2013 *Enemies of the Internet* report:

The Islamic Republic of Iran possesses a technological and legislative arsenal that allows it to keep its Internet under close surveillance. Filtering, control of Internet Service Providers, prohibitions, and monitoring of email content, chats and VoIP conversations are all legal.

. . . .

The current political situation is such that it is almost impossible to determine the criteria for blocking content. The number of authorities, institutions, commissions and committees with responsibility for Internet management has grown ever since Mahmoud Ahmadinejad became president. They subject the Iranian Internet to an illogical and uncoordinated rollercoaster on the basis of often divergent political interests.

REPORTERS WITHOUT BORDERS, ENEMIES OF THE INTERNET 2013 REPORT: SPECIAL EDITION: SURVEILLANCE 25 (2013), *available at* http://surveillance.rsf.org/en/wp-content/uploads/sites/2/2013/03/enemies-of-the-internet_2013.pdf.

1112. Internet in Syria was shut down twice in May 2013. Neil Macfarquhar & Anne Barnard, *U.N. Calls for Political Transition in Syria*, N.Y. TIMES, May 16, 2013, at A12 (“Internet and telephone communications were cut off in Syria for the second time this month. The government said it was because of technical difficulties, but monitoring companies have said the outages appear to be government-induced.”). A 1999 bid invitation to install a national Internet system in Syria from the Syrian Telecommunications Establishment, one of two entities that controls the Syrian Internet network, reveals that the system was designed from the beginning to include powerful filtering and monitoring functions. *See* SYRIAN TELECOMM. ESTABLISHMENT, SYRIAN ARAB REPUBLIC, SWD: 010/99, No. 18, TECHNICAL SPECIFICATIONS FOR THE NATIONAL INTERNET BACKBONE AND STE ISP (1999), *available at* http://surveillance.rsf.org/wp-content/uploads/2013/03/bidinvitation_ex.pdf. During the Arab Spring uprisings, the Syrian government launched numerous Man in the Middle and phishing attacks against opposition activists. *See* REPORTERS WITHOUT BORDERS, *supra* note 1111, at 31-33.

1113. In China, at least five different government bureaucracies play a role in monitoring or censoring the Internet: the Internet Affairs Bureau and the Centre for

In addition, “overlapping and conflicting national agendas” have complicated efforts to safeguard online privacy rights,¹¹¹⁵ particularly the “right to be forgotten.”¹¹¹⁶ This issue has become especially salient as private corporations, such as Facebook and Google, as well as other nongovernment actors, have come to play a larger role in shaping the meaning of free speech.¹¹¹⁷ The Global Online Freedom Act, which would prevent U.S. technology companies from cooperating with foreign governments to help them censor the Internet by levying civil and criminal penalties against those who do, has been introduced in every session of Congress since the 109th Congress,¹¹¹⁸ while the Global Internet Freedom Act, which would provide funding to combat Internet jamming by totalitarian foreign governments, was introduced in the 107th, 108th, and 109th Congresses, but has not been reintroduced since then.¹¹¹⁹

the Study of Public Opinion of the State Council Information Office, the Internet Bureau and the Information and Public Opinion Bureau of the Publicity Department (formerly the Propaganda Department), the Ministry of Industry and Information Technology, the Internet Information Security Supervision of the Ministry of Public Security, and the Ministry of Industry and Information Technology’s Internet Illegal Information Reporting Centre. See REPORTERS WITHOUT BORDERS, *supra* note 1111, at 19. China’s network of tools to filter, observe, and censor the Internet are collectively known as the “Great Firewall of China.” *Id.* at 20 (“The tools put in place to filter and monitor the Internet are collectively known as the *Great Firewall of China*.”); see also Mark McDonald, *Adding More Bricks to the Great Firewall of China*, N.Y. TIMES (Dec. 23, 2012, 12:36 AM), http://rendezvous.blogs.nytimes.com/2012/12/23/adding-more-bricks-to-the-great-firewall-of-china/?_php=true&_type=blogs&_r=0.

1114. See sources cited *supra* notes 1110–12.

1115. Tim Wu, *The International Privacy Regime*, in SECURING PRIVACY IN THE INTERNET AGE 91, 92 (Anupam Chander, Lauren Gelman & Margaret Jane Radin eds., 2008). For one of the earlier analyses of the implications of the Internet’s breakdown of national boundaries on privacy rights, see generally Peter P. Swire, *Of Elephants, Mice, and Privacy: International Choice of Law and the Internet*, 32 INT’L LAW. 991 (1998).

1116. See Jeffrey Rosen, *Free Speech, Privacy, and the Web That Never Forgets*, 9 J. ON TELECOMM. & HIGH TECH. L. 345, 352 (2011).

1117. See Jeffrey Rosen, *The Delete Squad: A Small Group of Tech Executives Are Rewriting the Rules of Free Speech—Right Now*, NEW REPUBLIC, May 13, 2013, at 20, 23, 27.

1118. Global Online Freedom Act of 2007, H.R. 275, 110th Cong.; Global Online Freedom Act of 2009, H.R. 2271, 111th Cong.; Global Online Freedom Act of 2011, H.R. 1389, 112th Cong.; Global Online Freedom Act of 2013, H.R. 491, 113th Cong.

1119. Global Internet Freedom Act, H.R. 5524, 107th Cong. (2002); Global Internet Freedom Act, H.R. 48, 108th Cong. (2003); Global Internet Freedom Act, H.R. 2216, 109th Cong. (2005); see also Kaydee Smith, Note, *A Global First Amendment?*, 6 J. ON TELECOMM. & HIGH TECH. L. 509, 510 (2008).

Professor Wu argues that “any normative view of privacy must take into account the descriptive fact that much of the privacy policy that affects Americans will be set overseas.”¹¹²⁰ He suggests that Americans who want more privacy protection should lobby other nations “to enact strong and extraterritorial privacy legislation.”¹¹²¹ However, the U.S. may be unable to tackle online speech alone, and the development of international norms regarding free speech may be needed.¹¹²²

Another argument in favor of international uniformity is the need to prevent the imposition of negative externalities by one nation against another.¹¹²³ One example of an externality between U.S. states, which Calabresi and Terrell offer, is “air pollution emissions by Midwestern manufacturing states that caused acid rain in New England.”¹¹²⁴ Nations often “have little political incentive to correct them because the[ir] . . . own citizens may benefit from [the externality-producing activity], the costs of which are felt mainly by [nonresidents] with no vote in the . . . state’s elections.”¹¹²⁵

Externalities that arise from “dissonant conceptions” of legal issues “can undermine comity between nations, making [matters of international relations] like extradition more difficult.”¹¹²⁶ What is an example of an action by one nation that imposes negative externalities on another? One may be the death penalty, which has been abolished in the United Kingdom but not the United States.¹¹²⁷ “[I]n the case of *Soering* (1989),¹¹²⁸ it proved impossible for the State of Virginia to extradite a young German man from the United Kingdom to be tried for the murder of the parents of his American girlfriend,” Waldron notes.¹¹²⁹ “No credible assurance could be given that Soering would not face the death penalty and hence become vulnerable to the death row syndrome, which is regarded in itself as

1120. Wu, *supra* note 1115, at 93.

1121. *Id.*

1122. Cf. Smith, *supra* note 1119, at 519-29, 536 (describing two congressional efforts to unilaterally promote American free speech norms throughout the globe, but concluding that even the more promising of the two, coupled with other actions, would likely only lead to “a relatively minor change”).

1123. Cf. Jacques LeBoeuf, *The Economics of Federalism and the Proper Scope of the Federal Commerce Power*, 31 SAN DIEGO L. REV. 555, 570-73 (1994).

1124. Calabresi & Terrell, *supra* note 160, at 21.

1125. *Id.*

1126. WALDRON, *supra* note 75, at 116.

1127. *Soering v. United Kingdom*, 161 Eur. Ct. H.R. (ser. A) at 37-38 (1989).

1128. *Id.*

1129. WALDRON, *supra* note 75, at 116-17 (footnote inserted by authors).

an inhuman or unacceptably cruel form of treatment in European human rights law, but not in American law.”¹¹³⁰ A virtual global consensus on the death penalty, which the Court recognized in *Roper* with respect to crimes committed while under the age of eighteen,¹¹³¹ could promote legal harmony and reduce the potential for such externalities to occur. It might make particular sense to harmonize the laws of the world’s nations in those areas with regard to which nations frequently interact.¹¹³²

A third economic argument for international legal uniformity induced by the citation and reading of foreign cases rests on the economies of scale that are experienced when activities are coordinated once by a central entity—in this case, the *ius gentium* itself—rather than being done many times over by individual nations. “Less is not always more, and sometimes bigger is better,” Calabresi says.¹¹³³ “This is why national grocery market chains have largely replaced corner grocery stores.”¹¹³⁴ Just as “it is self-evident that there are economies of scale that are gained by letting the national government create an Air Force, a National Aeronautics and Space Administration, and a medical science research program through the National Institutes of Health,”¹¹³⁵ so it may make more sense to have one International Criminal Court, one World Bank, one International Monetary Fund, and one World Trade Organization than for each nation that is a party to one of these organizations to establish each of these bodies on their own. This explains why many European countries have chosen to develop a trans-European space program rather than develop their own programs independently.¹¹³⁶ International legal norms “can realize economies of scale that the [nation] states cannot.”¹¹³⁷

Finally, international legal uniformity may promote the protection of civil and human rights more effectively than having

1130. *Id.* at 117.

1131. *Roper v. Simmons*, 543 U.S. 551, 577 (2005) (“In sum, it is fair to say that the United States now stands alone in a world that has turned its face against the juvenile death penalty.”).

1132. WALDRON, *supra* note 75, at 187-88.

1133. Calabresi & Terrell, *supra* note 160, at 24.

1134. *Id.*

1135. *Id.*

1136. See *What Is ESA?*, EUR. SPACE AGENCY, http://www.esa.int/About_Us/Welcome_to_ESA/What_is_ESA (last visited Feb. 23, 2015).

1137. Calabresi & Terrell, *supra* note 160, at 24.

different countries enjoy total discretion in these matters.¹¹³⁸ This argument

has its origins in a debate that went on between 1787 and 1788, during the ratification process for the U.S. Constitution. Opponents of the Constitution, who called themselves the Anti-Federalists, argued that democracy was only possible in small city-states like Athens and Rome, before it acquired its empire. They claimed that government had to keep close to the source of its power (the people) to reduce agency and monitoring costs. Direct popular participation in governments larger than a city-state was obviously not feasible in the 18th Century given then-available technologies. Moreover, the Framers' prior experience with a sort of federalism through membership in the British Empire had soured them on the feasibility of making a distant imperial government responsive to democratic preferences in the provinces.¹¹³⁹

In *The Federalist No. 10*, James Madison responded to these concerns with an argument now understood as the backbone of American democracy.¹¹⁴⁰ He said that democracies are most threatened by factional conflict, which may yield a tyranny of the majority.¹¹⁴¹ Federalism, he argued, would solve this challenge by "[e]xtend[ing] the sphere" to take in a greater number of interest groups, making it unlikelier that any one faction would become entrenched and capable of consistently determining policy.¹¹⁴² "The latent causes of faction [were] . . . sown in the nature of man,"¹¹⁴³ Madison wrote. "Such a tyranny occurs, according to Madison, when an entrenched majority faction consistently decides an issue or a set of issues unjustly for its own self-interested benefit," Calabresi says.¹¹⁴⁴

According to Calabresi and Terrell, Madison argued that two structural features of federalism would make tyranny of the majority less likely to occur.¹¹⁴⁵ Madison believed, they say, that as the number and variety of interest groups increase, "[t]his increase in the number and variety of factions . . . would make it harder for a permanent tyrannical majority coalition to form and to endure at the

1138. *Cf. id.* at 26.

1139. *Id.* (footnotes omitted); *see also* THE ANTIFEDERALIST PAPERS 36-39 (Morton Borden ed., 1965).

1140. *See* Calabresi & Terrell, *supra* note 160, at 26-27. *See generally* Calabresi, *supra* note 893.

1141. *See* THE FEDERALIST NO. 10, *supra* note 893, at 77 (James Madison).

1142. *Id.* at 83.

1143. *Id.* at 79.

1144. Calabresi & Terrell, *supra* note 160, at 27; *see also* THE FEDERALIST NO. 10, *supra* note 893, at 77 (James Madison).

1145. Calabresi & Terrell, *supra* note 160, at 27.

national level as compared to the state level.”¹¹⁴⁶ Obviously, there are fewer interest groups at the national level than at the international level, making it less likely that a faction or coalition will become entrenched at the international level. Second, larger numbers of participants in a governmental community create communications and organizational problems that impede the ability of majorities “to discover their own strength and to act in unison.”¹¹⁴⁷ “As Madison foresaw, communication and organizational costs are comparatively lower for discrete and insular minorities than for large amorphous groups.”¹¹⁴⁸ Thus, “this organizational advantage that minorities have over majorities becomes even more pronounced” and helps ensure their protection.¹¹⁴⁹ The traits that render minorities more vulnerable at lower levels of government—“[t]he very discreteness and insularity that render minorities vulnerable”—give them disproportionate influence as the sphere is expanded.¹¹⁵⁰

As the number of sub-units increases, the problems of collective action, externalities, economies of scale, and civil rights justify the empowerment of higher levels of authority to make decisions relating to these questions that are binding on all.¹¹⁵¹ With regard to the *ius gentium*, therefore, arguments based on the economics of federalism at the very least cut both ways.

C. How the “Shining City on a Hill” Argument Supports the *Ius Gentium*¹¹⁵²

A third argument against citing or looking at the *ius gentium* is that America is “a shining city on a hill” that has, for two centuries, had an “exceptional mission as an exemplar of liberty and a refuge for those yearning for both freedom and economic opportunity,” and

1146. *Id.*; see also THE FEDERALIST NO. 10, *supra* note 893, at 83 (James Madison).

1147. THE FEDERALIST NO. 10, *supra* note 893, at 83 (James Madison).

1148. Calabresi & Terrell, *supra* note 160, at 29; Calabresi, *supra* note 893, at 1408; see also THE FEDERALIST NO. 10, *supra* note 893, at 77 (James Madison); MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS 46-47 (8th prtg. 1980) (discussing collective action problems of groups engaged in the provision of public goods).

1149. Calabresi & Terrell, *supra* note 160, at 29.

1150. *Id.* at 30.

1151. *Cf. id.* at 6.

1152. This is the term Professor Calabresi previously used in arguing, on the basis of American exceptionalism, against the citation of foreign law. See generally Calabresi, *American Exceptionalism*, *supra* note *.

that consequently, the citation of the law of foreign nation states from which our ancestors fled has no place in our courts.¹¹⁵³ We might respond by asserting that America is not, in fact, quite as unique a country as the proponents of the “shining city on a hill” thesis suggest—i.e., to dispute the fundamental premise of the argument. One could certainly argue that the similarities between America’s cultural, political, legal, and economic systems and those of the rest of the world in fact do outweigh the differences. But why bother? We assume that such a response would not satisfy those who do believe in the shining city on a hill thesis; this argument would likely only hold sway for those who already accept or are sympathetic to it. Furthermore, we ourselves are not willing to discard the notion that America is in some respects “a shining city on a hill.”¹¹⁵⁴

Instead, while acknowledging that the United States is an extraordinary country, one could argue that these very differences between us and the rest of the world in fact offer the strongest argument *in favor* of the *ius gentium*. Why? Let us simply remember the necessary conditions for systems of spontaneous order to operate efficiently. The wisdom of a crowd is proportional to the “diversity of opinion” or “private information” it possesses.¹¹⁵⁵ Thus, American exceptionalism suggests that the knowledge taken in by the *ius gentium* would be very diverse indeed, at least from our perspective. After all, the more unlike the rest of the world we are, the more we can learn from those nations that are different from us in various respects. If, as Surowiecki says, crowd wisdom is likelier to emerge when groups are diverse,¹¹⁵⁶ how valuable would the *ius gentium* be if all nations were similar to one another in relevant legal, cultural, social, and economic aspects? Is there not more to potentially learn from nations that are unlike our own?

This is not to say that the legal institutions of nations unlike our own are more likely to be wise or correct or applicable in U.S. constitutional cases. We may very well look at foreign legal regimes and then decide that we prefer our own. But with legal institutions so unlike our own, there is at least more to examine. Tautologically, the more exceptional America is, the more unlike other nations we are. The greater the differences between “us” and “them” are, however,

1153. *Id.* at 1365.

1154. *See generally id.*

1155. SUROWIECKI, *supra* note 115, at 10.

1156. *Id.*

the greater the diversity of private knowledge that the *ius gentium* would let us take into account, whether or not we choose to follow the foreign practice.¹¹⁵⁷ American exceptionalism offers an argument against the citation of foreign law, but it also suggests that the value of the *ius gentium* as a mechanism for discovering the best legal rules and principles would be quite high. The shining city on a hill argument, like the economics-of-federalism argument, thus arguably cuts both ways; it is certainly an idea that can sometimes be employed in defense of the *ius gentium* by its proponents.

D. Assuaging Concerns over American Sovereignty

A fourth argument against the *ius gentium* is that it would undermine American sovereignty.¹¹⁵⁸ It certainly would be true that the citation of foreign law would lack democratic legitimacy if judges were to apply it as authority in place of, or in ways that contradicted, existing American law—if it operated in a manner similar to Justice Scalia’s droll characterization of the *Roper* majority’s reasoning: “I do not believe that the meaning of . . . our Constitution[] should be determined by the subjective views of five Members of this Court and like-minded foreigners.”¹¹⁵⁹ We believe that this complaint may be overstated because even when American judges consult foreign legal materials, they do so at their own discretion, giving them “certainly nothing approaching binding weight[] in their decisions.”¹¹⁶⁰ It is not as if domestic judges are “submitting to [the] decisions of courts elsewhere as to a foreign overlord.”¹¹⁶¹ American judges choose to undertake a review of foreign law during the process of judicial reasoning, deciding whether to cite foreign law just as they decide whether to cite law review articles or books. The oft-stated fear that citing foreign law is like submitting to foreign rule “obscures the fact that it is always a domestic decision-maker who concludes that a non-U.S. rule should

1157. *Cf. id.*

1158. Waldron himself acknowledges, and confronts, this line of attack. WALDRON, *supra* note 75, at 20-21 (“One can almost hear the response: ‘They may be willing to prostitute their legal traditions, but we shouldn’t give up our sovereignty so easily.’”); *id.* at 168-70 (considering and responding to the sovereignty objection in greater depth).

1159. *Roper v. Simmons*, 543 U.S. 551, 608 (2005) (Scalia, J., dissenting).

1160. WALDRON, *supra* note 75, at 168-69.

1161. *Id.* at 168.

be” cited in a U.S. case.¹¹⁶² Regardless of whether one likes a particular decision of the U.S. Supreme Court, “it is U.S. judges,” acting with their own agency, “who are doing this in the course of American judicial reasoning,” not a foreign crown.¹¹⁶³

Even putting this point aside, however, arguments against citing foreign law resting on concerns over American sovereignty are misguided because, as Waldron says, the *ius gentium* should “complement the law of individual states, which are said to be ruled partly by [it] and partly by their own particular laws, in the rulings of those states’ national courts.”¹¹⁶⁴ It is “an additional common source of national law,” he says, “rather than . . . a distinct body of law in its own right.”¹¹⁶⁵ We think the idea of foreign judges imposing their own laws and precedents in direct contradiction to what has clearly been established as law in America is a straw man, and fears of such judicial perversion that have been expressed are borne out of either a misunderstanding or distorted understanding of what the *ius gentium* is. As Waldron makes clear, “everything depends on whether a convincing argument can be made that the proper interpretation of [constitutional or statutory] provisions like these requires or permits recourse to foreign law.”¹¹⁶⁶ If such an argument can be made, judges should consider foreign legal materials.¹¹⁶⁷ If it cannot be made, they should ignore foreign law altogether.¹¹⁶⁸ Waldron is correct in saying that “just as no foreign exporter forces us to take its goods, so no foreign legal system forces us to consider its precedents.”¹¹⁶⁹ When we look to foreign law, it is “because we judge it appropriate to do so.”¹¹⁷⁰

Judges should look to the decisions of foreign courts only when American law is so open-ended that it seems to invite, if not require, the citation of some source of understanding other than the text of the statute or constitutional provision in question. H.L.A. Hart speaks of the “open texture of law,”¹¹⁷¹ a concept borrowed from the works

1162. Mark Tushnet, *Transnational/Domestic Constitutional Law*, 37 LOY. L.A. L. REV. 239, 262 (2003) (emphasis omitted).

1163. WALDRON, *supra* note 75, at 169.

1164. *Id.* at 59.

1165. *Id.*

1166. *Id.* at 147.

1167. *Id.*

1168. *Id.*

1169. *Id.* at 169.

1170. *Id.*

1171. HART, *supra* note 128, at 124.

of Friedrich Waismann.¹¹⁷² What this term seeks to convey is that “however tightly we think we define an expression, there always remains a set of (possibly remote) possibilities under which there would be no right answer to the question of whether it applies.”¹¹⁷³ In other words, the plain text of a law, applied to a certain specific set of facts, often leaves room for interpretation or even discretion as to how it will be understood.¹¹⁷⁴ When this is so, who cares where helpful legal knowledge originates if it is useful to our courts’ contemporary inquiries? Again, we would never reject foreign epidemiological research because “this is an American epidemic we are fighting.”¹¹⁷⁵

The Supreme Court has traditionally worried democrats because it is an unelected body that can overturn laws passed by majoritarian legislatures.¹¹⁷⁶ Allowing it and other courts to rely on foreign law, and especially to pick and choose which foreign precedents they will cite, may further distance judicial decisions, which carry significant political implications, from the will of the people. Justice Scalia complained that the *Roper* majority cited foreign law “to set aside [a] centuries-old American practice—a practice still engaged in by a large majority of the relevant States.”¹¹⁷⁷ This is not an unreasonable concern, but if you are worried about unelected judges exercising discretion in issuing politically charged rulings, well, that train has already left the station. Even without citing foreign law, the Supreme Court has tremendous power to make important political decisions unchecked by the will of the

1172. D.M. MacKinnon, F. Waismann & W.C. Kneale, *Symposium: Verifiability*, 19 PROC. ARISTOTELIAN SOC’Y 101, 121 (1945).

1173. OXFORD DICTIONARY OF PHILOSOPHY 261 (Simon Blackburn ed., 2d ed. 2005).

1174. *Id.*

1175. WALDRON, *supra* note 75, at 101 (“It would be ridiculous to say that because the problem had arisen in the United States, we should look only to American science to solve it . . .”).

1176. For the most well-known, well-articulated, and most influential expression of this concern, see generally ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* (2d ed. 1968). In this book Bickel coined the phrase “counter-majoritarian difficulty” to describe the problem of unelected judges exercising judicial review over laws approved in a democratic, majoritarian fashion. *Id.* at 16. For a compelling argument from political science that the Supreme Court rarely strays far from the preferences of contemporary public majorities, see generally Dahl, *supra* note 878.

1177. *Roper v. Simmons*, 543 U.S. 551, 628 (2005) (Scalia, J., dissenting).

voting population.¹¹⁷⁸ It already chooses which precedents to obey, which to overturn, and whether to distinguish an old precedent from the facts before it. In 2000, the Supreme Court decided a presidential election without any need to reference foreign law.¹¹⁷⁹ It is regularly accused of engaging in judicial activism, from both the right and the left, and has been since before¹¹⁸⁰ *Bush v. Gore*,¹¹⁸¹ the Warren Court,¹¹⁸² and the *Lochner* Era.¹¹⁸³

1178. Although, we should remember that the Article V amendment process provides a way for the people to check the Supreme Court's ability to engage in decision-making with which they disagree. U.S. CONST. art. V.

1179. See generally *Bush v. Gore*, 531 U.S. 98 (2000).

1180. For instance, Abraham Lincoln relentlessly criticized the *Dred Scott* decision, which he considered to be the product of judicial activism. David F. Forte, *Lincoln, Marshall, and the Judicial Role*, 1 GEO. J.L. & PUB. POL'Y 149, 149 (2002). To Lincoln, Forte writes, "the 'illegitimacy' of *Dred Scott*" lay in the fact that the Supreme Court, in the guise of making a legal decision, instead made a political decision. Even worse, it was a political decision that sought to redefine the polity in fundamental, constitutional terms. . . . [H]e refused to grant legitimacy to a Court bent on substituting its will for the results reached by the branches of government that are charged with making political decisions.

Id. On the left, Forte writes, "[T]he Progressive movement expounded the notion that impermissible judicial activism included not only invalid political decisions made by the Court but also any decision wherein the Court struck down a considered act of Congress or of the States." *Id.* at 150. On the right, "[i]n reaction [to the jurisprudence of the Warren Court], conservatives claimed the courts were acting in an activist manner." *Id.* at 152.

1181. Jeffrey Toobin called the decision "a classic example of judicial activism, not judicial restraint, by the majority." Jeffrey Toobin, *Precedent and Prologue*, NEW YORKER (Dec. 6, 2010), http://www.newyorker.com/talk/comment/2010/12/06/101206taco_talk_toobin.

1182. Rebecca E. Zietlow, *The Judicial Restraint of the Warren Court (and Why It Matters)*, 69 OHIO ST. L.J. 255, 257 (2008) ("Indeed, in academia and in politics, the Warren Court is still synonymous with judicial activism."). Zietlow, however, argues that the Warren Court showed "restraint" and "deference towards congressional power." *Id.*

1183. See, e.g., Barry Friedman, *The History of the Countermajoritarian Difficulty, Part Three: The Lesson of Lochner*, 76 N.Y.U. L. REV. 1383, 1385 (2001) ("Until recently, scholars painted *Lochner* as the primary example of judicial activism, symbolic of an era during which courts inappropriately substituted their views as to proper social policy for those of representative assemblies."); HOWARD GILLMAN, *THE CONSTITUTION BESIEGED: THE RISE AND DEMISE OF LOCHNER ERA POLICE POWERS JURISPRUDENCE* 1 (1993) ("According to the long-standing common wisdom about this period, . . . conservative American judges began to aggressively disregard the proper boundaries of their authority in order to search out and destroy 'social legislation' that was inconsistent with their personal belief in laissez-faire economics and social Darwinism.").

For that reason, we think it is an unfair criticism to say that looking to the *ius gentium* would allow judges to pick and choose which sources of law to use and which to ignore in order to enact their ideological preferences under the guises of legal objectivity and neutrality. For better or for worse, judges already do this,¹¹⁸⁴ and it is hard to imagine that the availability of the *ius gentium* would make any real difference in the volume of this behavior one way or the other. We doubt that faithful, scrupulous judges who do not try to inject their own policy preferences into the law will begin doing so if the *ius gentium* is recognized as a valid source of law. Likewise, opportunistic judges can often find their fig leaves in other areas of legal indefiniteness, such as “traditional canons of statutory construction [which often] cut in different directions”¹¹⁸⁵ and the inherent indeterminacy of language itself.¹¹⁸⁶ The *ius gentium*, we believe, may actually *limit* judicial discretion, not unlike the way in which examination of legislative history is said to do the same by some of its proponents—the idea is that it can “best . . . respect the lawmaking supremacy of Congress” as a “junior partner in the lawmaking enterprise”¹¹⁸⁷ by ensuring that decisions are guided by “some form of *legislative* signal . . . rather than the judge’s own conception of which interpretation better completes the statutory scheme”¹¹⁸⁸—by making clear when judges are truly looking abroad to some source of law to discover universally applicable legal

1184. Recall Judge Kirby’s quote: “If judges want to be dishonest, then they’ll be dishonest.” Greaney, Kirby & Blumenson, *supra* note 1099, at 153.

1185. William N. Eskridge, Jr., *Textualism, The Unknown Ideal?*, 96 MICH. L. REV. 1509, 1534 (1998) (book review).

1186. *Id.* at 1533-35; see also Philip P. Frickey, *Wisdom on Weber*, 74 TUL. L. REV. 1169, 1180-81 (2000); Carlos E. González, *Turning Unambiguous Statutory Materials into Ambiguous Statutes: Ordering Principles, Avoidance, and Transparent Justification in Cases of Interpretive Choice*, 61 DUKE L.J. 583 (2011); A. Raymond Randolph, *Dictionaries, Plain Meaning, and Context in Statutory Interpretation*, 17 HARV. J.L. & PUB. POL’Y 71, 77-78 (1994) (“Legislative history . . . can supply information about how the statute is expected to operate, what subjects it addresses, what problems it seeks to solve, what objectives it tries to accomplish, and what means it employs to reach those objectives—all of which the judge may draw upon in testing his tentative construction of the statutory language. This process, then, may mark the difference between a blind decision and a decision made with one’s eyes open.” (footnote omitted)); Guido Calabresi, *Being Honest About Being Honest Agents*, 33 HARV. J.L. & PUB. POL’Y 907, 910-13 (2010).

1187. James J. Brudney & Corey Ditslear, *Liberal Justices’ Reliance on Legislative History: Principle, Strategy, and the Scalia Effect*, 29 BERKELEY J. EMP. & LAB. L. 117, 158 (2008).

1188. JOHN F. MANNING & MATTHEW C. STEPHENSON, *LEGISLATION AND REGULATION* 161 (2d ed. 2013).

principles and when they are simply making up jurisprudence out of whole cloth. We believe that when the entire weight of global jurisprudence on a specific subject leans strongly in the direction of a particular understanding of the law, a contrary interpretation by an opportunistic judge will naturally carry less credibility.

John Hart Ely said that the U.S. Constitution contains provisions that are “open-textured.”¹¹⁸⁹ Some, of course, clearly have explicit, unambiguous meanings; “the requirement that the President ‘have attained to the Age of thirty five years,’¹¹⁹⁰ for example, is in Ely’s words “so clear that a conscious reference to purpose seems unnecessary.”¹¹⁹¹ Other provisions, however, such as those that are “expected to govern a broader and more important range of problems” or whose “language was not intended to be restricted to its 1791 meaning,” seem to insist on “a reference to sources beyond the document itself and a ‘framers’ dictionary.”¹¹⁹² Ely says that these include: (1) the First Amendment’s prohibition of laws “‘abridging the freedom of speech’”;¹¹⁹³ (2) the Eighth Amendment’s prohibition on “‘cruel and unusual punishment[]’”;¹¹⁹⁴ (3) the Ninth Amendment’s protection of unenumerated rights;¹¹⁹⁵ and (4) the Fourteenth Amendment,¹¹⁹⁶ whose language is so open and sweeping, Ely claims, it cannot be understood as anything other than a “quite broad invitation[] to import into the constitutional decision process considerations that will not be found in the language of the amendment or the debates that led up to it.”¹¹⁹⁷ Ely speculates that the Court’s refusal to reconsider the stunted construction it gave the Fourteenth Amendment’s Privileges or Immunities Clause in the *Slaughter-House Cases* is due to the fact that “the invitation extended by the language of the clause is frightening.”¹¹⁹⁸ Further, uncertainty lies in the fact that, under *Corfield v. Coryell*, legislatures may trump even fundamental rights with “such restraints as the government may justly prescribe for the general good of the

1189. JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 13 (1980).

1190. *Id.* (quoting U.S. CONST. art. II, § 1, cl. 5).

1191. *Id.*

1192. *Id.*

1193. *Id.* (quoting U.S. CONST. amend. I).

1194. *Id.* (quoting U.S. CONST. amend. VIII).

1195. *Id.* at 14; U.S. CONST. amend. IX.

1196. U.S. CONST. amend. XIV.

1197. ELY, *supra* note 1189, at 14.

1198. *Id.* at 23.

whole.”¹¹⁹⁹ Not only must we ask whether a claimed right is a “privilege” or “immunity,” but also whether a law restricting said right may be “justly prescribe[d] for the general good.”¹²⁰⁰

Ronald Dworkin wrote that a judge’s “[d]iscretion, like the hole in a doughnut, does not exist except as an area left open by a surrounding belt of restriction.”¹²⁰¹ How should judges behave when there is no obvious meaning of a law—when the text of the law does not yield an immediately obvious “correct” answer? One option Dworkin raises is that “on some issue [an official] is simply not bound by standards set by the authority in question.”¹²⁰² His examples of this type of discretion include “a sergeant . . . who has been told to pick any five men for patrol he chooses or . . . a judge in a dog show . . . [who may] judge airedales before boxers if the rules do not stipulate an order of events.”¹²⁰³ Dworkin’s “‘law as integrity’”¹²⁰⁴ theory rests on the idea that the law must “speak with one voice, . . . act in a principled and coherent manner toward all . . . citizens,”¹²⁰⁵ so that judges should “identify legal rights and duties . . . on the assumption that they were all created by a single author—the community personified—expressing a coherent conception of justice and fairness.”¹²⁰⁶

What does any of this have to do with the *ius gentium*? Waldron says that American judges should remember “that their particular problem has been confronted before and that they, like scientists, should try to think it through in the company of those who have already dealt with it.”¹²⁰⁷ After all, Waldron says, “sometimes the material on which courts need to rely is [simply] not available locally.”¹²⁰⁸ He points to *Washington v. Glucksberg* (1997),¹²⁰⁹ saying that “Chief Justice Rehnquist drew heavily on Dutch experience with a scheme of legalized euthanasia to establish the regulatory challenges that surround this practice and to argue against simply blundering into this area with judicial fiat.”¹²¹⁰ Vicki Jackson notes

1199. 6 F. Cas. 546, 552 (E.D. Pa. 1823).

1200. *Id.*

1201. DWORKIN, TAKING RIGHTS SERIOUSLY, *supra* note 522, at 31.

1202. *Id.* at 32.

1203. *Id.*

1204. DWORKIN, LAW’S EMPIRE, *supra* note 522, at 94.

1205. *Id.* at 165.

1206. *Id.* at 225.

1207. Waldron, *Foreign Law*, *supra* note 87, at 133.

1208. WALDRON, *supra* note 75, at 89.

1209. 521 U.S. 702 (1997).

1210. WALDRON, *supra* note 75, at 89.

Justice Robert Jackson's concurring opinion in *Youngstown Sheet & Tube Co. v. Sawyer* (1952),¹²¹¹ in which he expressed the view that other nations' "experience[s] with emergency powers may not be irrelevant to the argument" before the Court.¹²¹² In doing so, he "examined German, French, and British history and constitutional practice in the period leading up to and during World War II" with respect to emergency executive powers.¹²¹³ Where American law is porous, we believe foreign law may help judges determine the wisest way to fill in the holes. If the American legal regime is a house and our laws are the walls, floors, and ceilings, we believe the *ius gentium* can be thought of as epoxy; something that may help to efficiently fill in holes when they manifest themselves. Will reference to or citation of foreign law often be dispositive? Hardly! In fact, we expect that it seldom would be, and that is as it should be; Waldron rightfully notes that "defenders of the citation of foreign law do not usually maintain that consistency with foreign law should be the be-all and end-all."¹²¹⁴

Finally, we think that the idea of sovereignty turns out to not be a very potent argument against recognition of the *ius gentium* for two reasons. First, we believe that the notion of sovereignty runs contrary to the principle of "subsidiarity," which, as Professor Calabresi and Lucy Bickford have said elsewhere, "recognizes the natural right of individuals to have their problems addressed by the level of government that is closest to them."¹²¹⁵ They say that "[r]estricting lawmaking to the state or provincial level" has the advantages of accommodating local "tastes, preferences, and real world conditions" and letting jurisdictions offer "different bundle[s] of public goods, levels of taxation, and government services."¹²¹⁶ We believe these interests should also be taken into account when deciding the degree to which considerations of foreign law may be appropriate in specific instances of judicial decision-making. However, we believe there will be some cases—particularly those involving broad, ambiguous,

1211. 343 U.S. 579 (1952).

1212. *Id.* at 651 (Jackson, J., concurring); see also Vicki C. Jackson, *Constitutional Law and Transnational Comparisons: The Youngstown Decision and American Exceptionalism*, 30 HARV. J.L. & PUB. POL'Y 191, 198-201 (2006).

1213. Jackson, *supra* note 1212, at 199.

1214. WALDRON, *supra* note 75, at 162.

1215. Calabresi & Bickford, *supra* note 884, at 19. *But see* Aurélian Portuese, *The Principle of Subsidiarity as a Principle of Economic Efficiency*, 17 COLUM. J. EUR. L. 231 (2011).

1216. Calabresi & Bickford, *supra* note 884, at 11.

rights-granting constitutional provisions,¹²¹⁷ whose meanings must be, as Balkin says, “fill[ed] out over time through constitutional construction”¹²¹⁸—where need for some measure of global jurisprudential uniformity will make it advisable that the development of American jurisprudence ought to take place with one eye toward what Waldron calls “the legal wisdom of the world.”¹²¹⁹

Just as importantly, we would argue that the U.S. Constitution spreads power so thinly across so many American political actors and institutions that indivisible American sovereignty arguably does not really exist, at least not in a practical sense. Morton Grodzins rejects the “layer cake” theory of American government, characterized by “the institutions and functions of each ‘level’ being considered separately,” for what he calls the “marble cake” model.¹²²⁰ “No important activity of government in the United States is the exclusive province of one of the levels,” he says.¹²²¹ Rather,

[t]he multitude of governments does not mask any simplicity of activity. There is no neat division of functions among them. If one looks closely, it appears that virtually all governments are involved in virtually all functions. More precisely, there is hardly an activity that does not involve the federal, state, and some local government in important responsibilities. Functions of the American governments are shared functions.¹²²²

We believe in dual federalism and reject the marble-cake theory, but we also believe that the structure of government that the Framers established in the Constitution also undermines any claim that in our system, absolute sovereignty resides in any one actor or entity. Separation of powers ensures that “the legislative, executive, and judiciary departments . . . be separate and distinct”¹²²³ and “confine[d] . . . to its assigned responsibility,”¹²²⁴ while bicameralism divides the legislative power “into two distinctive bodies,”¹²²⁵ the

1217. Some examples of these constitutional provisions are the Fifth Amendment’s prohibition of takings without just compensation, the Eighth Amendment’s prohibition of cruel and unusual punishments, or the Fourteenth Amendment’s protection of the privileges or immunities of citizens of the United States. See U.S. CONST. amends. V, VIII, XIV.

1218. See BALKIN, *supra* note 429, at 3.

1219. WALDRON, *supra* note 75, at 188.

1220. Morton Grodzins, *The American System*, in CLASSICS OF PUBLIC ADMINISTRATION 213, 216 (Jay M. Shafritz & Albert C. Hyde eds., 7th ed. 2012).

1221. *Id.*

1222. *Id.* at 213.

1223. THE FEDERALIST NO. 47, *supra* note 761, at 249 (James Madison).

1224. INS v. Chadha, 462 U.S. 919, 951 (1983).

1225. *Id.*

“aristocratic Senate . . . [and] the popular House,”¹²²⁶ both of which must pass a bill in identical form before it can be presented to the President for his signature.¹²²⁷ Add in scores of administrative agencies that exist “independent of executive authority”¹²²⁸ and it quickly becomes apparent to us that power is too scattered and dispersed for any one actor to exercise sovereign power,¹²²⁹ which in any event the Constitution reserves to “We the People.”¹²³⁰ Federalism, meanwhile, ensures “the proper division of authority between the Federal Government and the States.”¹²³¹ Under the Tenth Amendment, “powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”¹²³² The powers of the federal government are, in turn, limited to those that are enumerated and granted by the Constitution.¹²³³

Since at least the New Deal, however, the “cooperative model” has defined the federal system and the Supreme Court’s approach to

1226. Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power over Foreign Affairs*, 111 YALE L.J. 231, 290 (2001).

1227. U.S. CONST. art. I, § 7, cl. 2.

1228. *Humphrey’s Ex’r v. United States*, 295 U.S. 602, 625 (1935).

1229. See generally Grodzins, *supra* note 1220.

1230. U.S. CONST. pmbi.

1231. *New York v. United States*, 505 U.S. 144, 149 (1992).

1232. U.S. CONST. amend. X.

1233. *Id.* art. I, § 2, cl. 5 (“The House . . . shall have the sole Power of Impeachment.”); *id.* art. I, § 3, cl. 6 (“The Senate shall have the sole Power to try all Impeachments.”); *id.* art. I, § 4, cl. 1 (“The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations”); *id.* art. I, § 10, cl. 2 (“No State shall, without the Consent of the Congress, lay any Imposts or Duties”); *id.* art. II, § 1, cl. 4 (“The Congress may determine the Time of chusing the Electors”); *id.* art. II, § 1, cl. 6 (“[T]he Congress may by Law provide for the Case of Removal, Death, Resignation or Inability, . . . declaring what Officer shall then act as President”); *id.* art. III, § 1 (“The judicial Power of the United States, shall be vested in . . . such inferior Courts as the Congress may from time to time ordain and establish.”); *id.* art. III, § 2, cl. 3 (“[T]he Trial shall be at such Place or Places as the Congress may by Law have directed.”); *id.* art. III, § 3, cl. 2 (“The Congress shall have Power to declare the Punishment of Treason”); *id.* art. IV, § 1 (“Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.”); *id.* art. IV, § 3, cl. 1 (“New States may be admitted by the Congress into this Union”); *id.* art. IV, § 3, cl. 2 (“The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States”); *id.* art. V (“The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution”).

federalism issues.¹²³⁴ The New Deal was characterized by an “expansion of national government in economic and social policy [that] was seen as a necessary means of addressing grave national economic conditions.”¹²³⁵ President Johnson’s “Creative Federalism” would “further shift[] the power relationship between governmental levels toward the national government through the expansion of grant-in-aid system and the increasing use of regulations.”¹²³⁶ Some scholars suggest that “[f]ederalism in the United States is entering a

1234. See Harry N. Scheiber, *American Federalism and the Diffusion of Power: Historical and Contemporary Perspectives*, 9 U. TOL. L. REV. 619, 644 (1978) (“In many basic respects, modern cooperative federalism was the child of the Great Depression and the New Deal.”); Clifford Lee Staten, *Theodore Roosevelt: Dual and Cooperative Federalism*, 23 PRESIDENTIAL STUD. Q. 129, 130 (1993) (“Most scholars agree that the cooperative model aptly describes the federal system since the administration of Franklin Roosevelt.”); Emily Zackin, *What’s Happened to American Federalism?*, 43 POLITY 388, 389 (2011) (“It is frequently said that with the expansion of federal power and the explosion of New Deal grant-in-aid programs, the United States moved from a system in which the primary relationship between the two levels of government was one of competition (often known as dual federalism) to a system characterized by collaboration (often known as cooperative federalism).”); Keith E. Whittington, *Dismantling the Modern State? The Changing Structural Foundations of Federalism*, 25 HASTINGS CONST. L.Q. 483, 483 (1998) (“Since the onset of the Great Depression, that centralization [of political power in the national government] has been relatively rapid.”); Norman R. Williams, *The Commerce Clause and the Myth of Dual Federalism*, 54 UCLA L. REV. 1847, 1851 (2007) (“Proponents[,] . . . such as Justice Thomas, believe that the modern Court departed from a dual federalist interpretation of federal authority that prevailed prior to the New Deal and that a proper understanding of and respect for history requires the modern Court to return to this preexisting model of American federalism in reviewing federal legislation.”); Joseph F. Zimmerman, *National-State Relations: Cooperative Federalism in the Twentieth Century*, 31 PUBLIUS 15, 28 (2001) (“Many scholars concluded that the period of the dominance of the loosely defined theory of dual federalism ended in 1937 when the United States Supreme Court commenced to uphold the constitutionality of New Deal statutes by a five-to-four vote.”); Ernest A. Young, *Dual Federalism, Concurrent Jurisdiction, and the Foreign Affairs Exception*, 69 GEO. WASH. L. REV. 139, 139 (2001) (“The Court’s effort, commonly known as ‘dual federalism,’ died an ignominious death in 1937 or shortly thereafter.”); Robert A. Shapiro, *From Dualist Federalism to Interactive Federalism*, 56 EMORY L.J. 1, 5 (2006) (“After 1937, dual federalism lost all descriptive force. The Supreme Court acquiesced in a broad expansion of federal authority.”).

1235. EUGENE BOYD & MICHAEL K. FAUNTROY, CONG. RESEARCH SERV., RL30772, *AMERICAN FEDERALISM, 1776 TO 2000: SIGNIFICANT EVENTS* 11 (2000). For a classic treatment of dual and cooperative federalism, see generally Edward S. Corwin, *The Passing of Dual Federalism*, 36 VA. L. REV. 1 (1950).

1236. BOYD & FAUNTROY, *supra* note 1235, at 12.

third phase,”¹²³⁷ an “interactive federalism” characterized by a recognition that “the goals of federalism are best achieved not through the quixotic attempt to separate state and federal spheres, but through embracing the interaction of state and federal governments.”¹²³⁸ We believe that today the United States has witnessed such a wide dispersion of political power among such diverse governmental units that the unitary exercise of American sovereignty is neither practicable nor advisable. The sovereignty objection to the *ius gentium* is weak because it is already questionable whether sovereignty currently exists at all in a meaningful sense.

While popular sovereignty is a guiding principle of the system of government enacted by the Constitution,¹²³⁹ it is not absolute in practice. After all, the Framers chose a “republican government” because they believed that “the public voice, pronounced by the representatives of the people, will be more consonant to the public good, than if pronounced by the people themselves.”¹²⁴⁰ The President is elected by an electoral college, not directly by the people.¹²⁴¹ Prior to the passage of the Seventeenth Amendment,¹²⁴² senators were chosen indirectly by state legislatures,¹²⁴³ and today they are chosen for lengthy six-year terms¹²⁴⁴ that “lessen the immediate pressure of public opinion on members of the Senate”;¹²⁴⁵

1237. Robert A. Schapiro, *Interjurisdictional Enforcement of Rights in a Post-Erie World*, in NEW FRONTIERS OF STATE CONSTITUTIONAL LAW: DUAL ENFORCEMENT OF NORMS 103, 106 (James A. Gardner & Jim Rossi eds., 2011).

1238. *Id.* at 107.

1239. That the Constitution’s very first words are an assertion that it is the instrument of “We the People,” established for the purpose of securing for them “a more perfect Union, . . . Justice, . . . domestic Tranquility, . . . common defence, . . . general Welfare, and . . . the Blessings of Liberty” serve as testament to the preeminence of the principle of popular sovereignty in its internal philosophy. U.S. CONST. pmbl.

1240. THE FEDERALIST NO. 10, *supra* note 761, at 46, 48 (James Madison).

1241. U.S. CONST. art. II, § 1, cls. 1-4.

1242. *Id.* amend. XVII.

1243. *Id.* art. I, § 3, cl. 1.

1244. *Id.* amend. XVII.

1245. *The U.S. Senate*, U.S. CAPITOL VISITOR CENTER, <http://www.visitthecapitol.gov/about-congress/the-us-senate#.VNexjUswwlM> (last visited Feb. 23, 2015); see also Jonathan P. Kstellec, Jeffrey R. Lax & Justin H. Phillips, *Public Opinion and Senate Confirmation of Supreme Court Nominees*, 72 J. POL. 767, 768 (2010) (“Although six-year terms provide senators with greater insulation than representatives, a reelection-minded senator will constantly consider how his votes, particularly highly visible ones, may affect approval back home.”).

Supreme Court Justices are not elected at all,¹²⁴⁶ and once confirmed “shall hold their Offices during good Behaviour.”¹²⁴⁷ Only the House of Representatives, whose members serve the shortest terms of any elected federal officers¹²⁴⁸ and who lack the power to confirm presidential appointees or ratify treaties with foreign powers,¹²⁴⁹ were originally elected directly “by the People of the several States.”¹²⁵⁰ If America’s soul is popular sovereignty, its body was designed in part as that of a “Mixed Regime”; as Paulsen et al. note,

the wisest of the framers, like John Adams, Alexander Hamilton, and Gouverneur Morris, still believed that the eighteenth century Mixed Regime Constitution of Britain was the best constitution . . . [and] set out to create a wholly democratic and republican version of the Mixed Regime of the One, the Few, and the Many.¹²⁵¹

The other response we might offer is that the people in fact *have* authorized judges to sometimes look to foreign sources of law to shed light on the meaning of American legal materials.¹²⁵² By

1246. U.S. CONST. art. II, § 2, cl. 2.

1247. *Id.* art. III, § 1.

1248. Members of the House are “chosen every second Year,” *id.* art. I, § 2, cl. 1, compared with Senators, who serve “for six Years,” *id.* art. I, § 3, cl. 1, and the President, who serves “the Term of four Years,” *id.* art. II, § 1, cl. 1.

1249. Both of these powers are exclusively committed to the Senate. *Id.* art. II, § 2, cl. 2.

1250. *Id.* art. I, § 2, cl. 1. Moreover, the widespread redistricting practice of gerrymandering, drawing district lines to favor partisan groups, has to an extent undermined the argument that the House is comparatively more democratic than the Senate. A large body of literature examines this phenomenon. For theoretical perspectives, see generally Thomas W. Gilligan & John G. Matsusaka, *Structural Constraints on Partisan Bias Under the Efficient Gerrymander*, 100 PUB. CHOICE 65 (1999); Faruk Gul & Wolfgang Pesendorfer, *Strategic Redistricting*, 100 AM. ECON. REV. 1616 (2010). For empirical studies, see generally Alan I. Abramowitz, *Partisan Redistricting and the 1982 Congressional Elections*, 45 J. POL. 767 (1983); Bruce E. Cain, *Assessing the Partisan Effects of Redistricting*, 79 AM. POL. SCI. REV. 320 (1985); GARY W. COX & JONATHAN N. KATZ, ELBRIDGE GERRY’S SALAMANDER: THE ELECTORAL CONSEQUENCES OF THE REAPPORTIONMENT REVOLUTION (2002); Michael C. Herron & Alan E. Wiseman, *Gerrymanders and Theories of Law Making: A Study of Legislative Redistricting in Illinois*, 70 J. POL. 151 (2008); Nolan McCarty, Keith T. Poole & Howard Rosenthal, *Does Gerrymandering Cause Polarization?*, 53 AM. J. POL. SCI. 666 (2009). Jowei Chen and Jonathan Rodden, meanwhile, argue that partisan bias in election results is not due to deliberate gerrymandering but to the inefficient geographic distribution of Democratic voters. See Jowei Chen & Jonathan Rodden, *Unintentional Gerrymandering: Political Geography and Electoral Bias in Legislatures*, 8 Q.J. POL. SCI. 239 (2013).

1251. PAULSEN ET AL., *supra* note 968, at 200.

1252. See generally BLACK, *supra* note 1047.

establishing a Constitution that vests “judicial Power of the United States . . . in one supreme Court, and in such inferior Courts as the Congress may . . . ordain and establish,”¹²⁵³ we could argue that the American people authorized judges to hear “Cases” and “Controversies” arising under it, “the Laws of the United States, and Treaties” entered under its authority.¹²⁵⁴ By establishing a Constitution that declares itself to “be the supreme Law of the Land,”¹²⁵⁵ along with the laws of the United States and treaties entered into under its authority, we might argue, the American people authorized—no, commanded—judges to judicially enforce the Constitution’s provisions by invalidating inferior sources of law incompatible with it. We believe that in enacting vague, unspecified, and indeterminate constitutional provisions, which nonetheless are superior to all other forms of law and cannot be disregarded,¹²⁵⁶ the American people authorized judges to seek out necessary, useful, and relevant sources of information beyond the scope of the text itself to better understand what the Constitution means and requires, even when this meaning is not always initially clear.

And finally, by not expressly forbidding judges from turning to any particular source of legal knowledge or information in their inquiries into the meaning of unclear or open-ended provisions of constitutional law, we believe that the people authorized judges to look beyond our own borders to any source of wisdom that can shed light on the denotation of these provisions, and that sometimes, foreign law may serve as a source of such light-shedding wisdom. Thus, it seems to us that in adopting the Constitution as their own law, the people may have indeed authorized judges to look for knowledge pertaining to American law in foreign sources of law, at least under some circumstances, the specifics of which are discussed elsewhere in this Article. We argue that there can be no fully persuasive objection to the judicial invocation of the *ius gentium*, then, on the grounds of popular sovereignty, since we believe that it is ultimately an expression of popular sovereignty itself—namely the U.S. Constitution—which legitimizes the *ius gentium*, inviting judges to reference it. We believe the people may in some limited number of cases have authorized judges to look for knowledge in

1253. U.S. CONST. art. III, § 1.

1254. *Id.* art. III, § 2.

1255. *Id.* art. VI, cl. 2.

1256. *Id.*

foreign sources of law when seeking a better understanding of the legal materials before them.

Sovereignty is a much newer idea than some people realize; the dominant historical account of sovereignty dates the concept back only to the End of the Thirty Years' War and the Peace of Westphalia in 1648.¹²⁵⁷ Andreas Osiander argues that this narrative itself "is really a product of the nineteenth- and twentieth-century fixation on the concept of sovereignty."¹²⁵⁸ With nearly 200 countries in the world,¹²⁵⁹ and given the increasing global interconnectedness caused by travel and communication, we believe that the idea of the absolute sovereignty of nation states is less tenable than it was even seventy years ago, when the United Nations was formed.¹²⁶⁰ Even if emphasis on national sovereignty was essential at that time with the dissolution of European colonial empires,¹²⁶¹ we think that today it is more necessary to set up international systems of coordination to "harmonize the way in which the laws about fundamental rights are administered."¹²⁶² Today, indivisible sovereignty is weakened by the emergence of "powerful non-sovereign actors than ever before, including corporations, non-governmental organizations, terrorist groups, drug cartels, regional and global institutions, and banks and private equity funds."¹²⁶³ As the "accelerating flow of people, ideas, greenhouse gases, goods, dollars, drugs, viruses, e-mails, and weapons within and across borders" increases, the notion that governments possess absolute territorial authority over the areas within their geographic borders grows increasingly antiquated.¹²⁶⁴

We will therefore offer a final piece of advice for American judges to follow when looking to or citing the *ius gentium* to inform their decision-making. Unlike the other guidelines we laid out in this

1257. See generally Andreas Osiander, *Sovereignty, International Relations, and the Westphalian Myth*, 55 INT'L ORG. 251 (2001), for an overview of and revisionist challenge to this popular narrative.

1258. *Id.* at 251.

1259. See *Member States of the United Nations*, UNITED NATIONS, <http://www.un.org/en/members/> (last visited Feb. 23, 2015).

1260. *UN at a Glance*, UNITED NATIONS, <http://www.un.org/en/aboutun/index.shtml> (last visited Feb. 23, 2015).

1261. See *Milestones: 1945-1952: Decolonization of Asia and Africa, 1945-1960*, U.S. DEPARTMENT ST. OFF. HISTORIAN, <http://history.state.gov/milestones/1945-1952/asia-and-africa> (last visited Feb. 23, 2015).

1262. WALDRON, *supra* note 75, at 112.

1263. See Richard N. Haass, *Sovereignty*, FOREIGN POL'Y, Sept./Oct. 2005, at 54, 54.

1264. *Id.*

Article, this one should not be thought of as a suggestion, but as a firm rule. It is this: The *ius gentium* should never be used to displace American law, only to understand it better. As Professor Young says, the existence of “a ‘consensus’ at the . . . international level” should not “displace state-by-state diversity on . . . question[s]” of local law.¹²⁶⁵ We urge that American judges should only look to foreign law when American law and the constitutional text is “indeterminate,”¹²⁶⁶ to use Jack Balkin’s term, and where looking at foreign sources is helpful in understanding our own law better. When the meaning or text of our own law is clear, as it often is, the citation of foreign law cannot be justified;¹²⁶⁷ we believe this would indeed undermine American sovereignty and would pose significant problems regarding democratic legitimacy. Judges should only turn to the *ius gentium* when statutes or constitutional provisions seem to invite the application of some outside source of understanding. And even where unique considerations of American constitutional structure are relevant to the query being grappled with by an American court,¹²⁶⁸ Waldron notes that “we may be able to learn from other countries how to analyze the bearing of federal structure on a problem.”¹²⁶⁹ A shorter, simpler way to put our view is that the *ius gentium* can and should never *displace* American law; what it does is help American jurists better *understand* those areas of law that are unclear or indeterminate and require reference to some outside source of knowledge.

So do we argue that the *ius gentium* is, in fact, sometimes binding? No, or at least not in a “peremptory, no-holds-barred, no-questions-asked manner in which some legal philosophers suppose authoritative law has to bind us”—Waldron himself acknowledges as much.¹²⁷⁰ He says that “[i]n . . . areas where . . . legal systems already have their own applicable law, the function of [the] *ius gentium* is not to preempt that law but to [be available to] guide its elaboration

1265. Young, *supra* note 72, at 165.

1266. BALKIN, *supra* note 429, at 294.

1267. We think that Judge Easterbrook got the basic idea right in articulating his stance on the use of legislative history to determine statutory meaning: “So the text is law and legislative intent a clue to the meaning of the text, rather than the text being a clue to legislative intent.” *Cont’l Can Co. v. Chi. Truck Drivers, Helpers & Warehouse Workers Union (Indep.) Pension Fund*, 916 F.2d 1154, 1158 (7th Cir. 1990).

1268. See generally CHARLES L. BLACK, JR., *STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW* (1969).

1269. WALDRON, *supra* note 75, at 103.

1270. *Id.* at 153.

and development.”¹²⁷¹ So what sort of authority does the *ius gentium* have? To answer that question, it is helpful to examine a model of “weak” judicial review proposed by Mark Tushnet.¹²⁷² Tushnet criticizes the “strong-form” judicial review practiced by the U.S. Supreme Court, in which judicial decisions are binding on the other branches of government.¹²⁷³ He extols “weak-form review” models practiced by courts in nations such as the U.K. and Canada, where “judicial interpretations of constitutional provisions can be revised in the relatively short term by a legislature.”¹²⁷⁴ Such systems, he says, are “attractive in part because they preserve legislative authority: weak-form systems assume that legislatures given responsibility for participating in the development of constitutional meaning, in dialogue with the courts, will do so reasonably well.”¹²⁷⁵

Tushnet says that this weaker model of judicial review is consistent with “incorporating social and economic rights in constitutions.”¹²⁷⁶ Two arguments often advanced against the constitutionalization of “social welfare rights,” Tushnet says, are that

courts . . . lack the capacity to give appropriate content to general social welfare rights in the context of particular controversies, and . . . [that] judicial enforcement of social welfare rights is particularly intrusive on legislative—and therefore democratic—choice because enforcing social and economic rights typically has substantially larger implications for a government’s budgets than enforcing first-generation rights does.¹²⁷⁷

Weak judicial review, he says, undermines these objections.¹²⁷⁸ The *ius gentium* should be similarly understood as being weakly citable by American courts, which may not be well equipped in all scenarios to discern or apply the “global” position or consensus that has emerged on a specific legal issue. An American court should never disregard existing American law in favor of foreign standards. The

1271. Waldron, *Foreign Law*, *supra* note 87, at 139.

1272. See generally MARK TUSHNET, *WEAK COURTS, STRONG RIGHTS: JUDICIAL REVIEW AND SOCIAL WELFARE RIGHTS IN COMPARATIVE CONSTITUTIONAL LAW* (2008).

1273. *Id.* at x (“The problem with strong-form judicial review is that the courts’ determinations of what the constitution means are frequently simultaneously reasonable ones and ones with which other reasonable people could disagree.”).

1274. *Id.* at 24. Tushnet also notes “that these nations are reasonably well-functioning democracies in which civil liberties and civil rights are reasonably well protected.” *Id.*

1275. *Id.* at xi-xii.

1276. *Id.* at xi.

1277. *Id.*

1278. *Id.*

ius gentium would at most merely bring the discrepancy between domestic and foreign legal standards to the attention of the American court, which would ultimately have the final say over what course of action to take.

Before ending this discussion, we will note that while the Declaration of Independence does declare that the legitimacy of a legal regime requires the “consent of the governed,”¹²⁷⁹ democracy is not, as Waldron notes, the be all and end all of political legitimacy.¹²⁸⁰ Originalism, Dworkinian notions of law as integrity, and the principle of *stare decisis* all purport that certain things are relevant to the legitimacy of a particular judicial ruling other than just whether it conforms with the peoples’ democratic will. Consider the views of two of the most prominent originalists of our time: Judge Robert Bork said that in interpretation, “what counts is what the public understood,”¹²⁸¹ while Justice Scalia believes that the Constitution ought to be understood in light of the text’s original meaning as it was understood by “intelligent and informed people of the time.”¹²⁸² “Law as integrity” identifies “consistency in principle as a source of legal rights.”¹²⁸³ *Stare decisis* reflects the notion that “the rule of law underlying our own Constitution requires such continuity over time that a respect for precedent is, by definition, indispensable.”¹²⁸⁴ These ideas all conflict with a purely democracy-oriented jurisprudence, as each says that the people’s will does not always make for the right legal answer.

Even as the Declaration of Independence lambasts the “abuses and usurpations” of the King, it claims “a decent respect to the opinions of mankind,”¹²⁸⁵ not just for those of the American people. It is not entirely fair, then, to say that the sentiments of the Founders

1279. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

1280. WALDRON, *supra* note 75, at 154.

1281. ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 144 (1990).

1282. Scalia, *supra* note 821, at 38; *see also* Steven G. Calabresi & Julia T. Rickert, *Originalism and Sex Discrimination*, 90 TEX. L. REV. 1, 4 (2011) (“Our thesis starts from the premise that originalists ought to begin and end all analysis with the original public meaning of constitutional texts. We believe we are following Justice Scalia’s methodology completely in this regard.” (footnote omitted)).

1283. DWORKIN, LAW’S EMPIRE, *supra* note 522, at 134.

1284. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 854 (1992) (citing Lewis F. Powell, Jr., *Stare Decisis and Judicial Restraint*, 1991 J. SUPREME CT. HIST. 13, 16).

1285. THE DECLARATION OF INDEPENDENCE paras. 1, 2 (U.S. 1776).

ran entirely against considering the attitudes and perspectives of foreigners, for it seems that such opinions might indeed have weighed on their minds.

Finally, if, as we believe, the *ius gentium* is not inconsistent with, but may complement, the principle of popular sovereignty, we would argue that Congress has the power with the support of a three-quarters majority of the states to ratify a constitutional amendment¹²⁸⁶ banning reliance on foreign law. Such an amendment would clearly reflect the will of the people that the *ius gentium* not take effect in the people's territory. In other words, the *ius gentium* is not self-executing *independent of popular sovereignty*; the people can choose to abridge or eliminate its effect in the judicial chambers.

We do not think that such an amendment would be wise; the people would be needlessly denying themselves what Waldron calls the useful "possibility of epistemic benefits from recourse to foreign law."¹²⁸⁷ However, in democratic societies, the people are entitled to make the decision of whether they want foreign law to partially govern them, even if their judgment is what some might call foolish. There may be good reasons to think that the *ius gentium* is a good idea, but if the people want to exclude foreign law from their territory, they may do so. Those who express their objections to the *ius gentium* in terms of democratic legitimacy may rest easy.

E. Compatibility with Originalism

A final criticism of international legal borrowing is that the practice is incompatible with a jurisprudence based in originalism, which requires that the text of the Constitution be interpreted in light of the original meaning behind it.¹²⁸⁸ According to Rosenkranz, "using foreign law to interpret the U.S. Constitution . . . is

1286. U.S. CONST. art. V.

1287. WALDRON, *supra* note 75, at 86.

1288. Justice Scalia suggests that his dislike of citing foreign law is rooted in his preference for originalism. Dorsen, *supra* note 137, at 525. Professor Calabresi has argued that under an originalist analysis, the citation of foreign law in constitutional cases is sometimes permissible, but usually is not. Calabresi, *supra* note 71, at 1102. For discussions on the meaning of originalism, see Richard S. Kay, *Original Intention and Public Meaning in Constitutional Interpretation*, 103 Nw. U. L. REV. 703, 704 (2009); Vasani Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution's Secret Drafting History*, 91 GEO. L.J. 1113, 1132 (2003) (suggesting an "original, objective-public-meaning textualism").

inconsistent with basic principles reflected in the Constitution itself.”¹²⁸⁹

As two fans of originalist reasoning, we disagree that there is always a conflict between citing the *ius gentium* and originalism. There are certainly many fields of law in which originalists may not be at all interested with the practices and judgments of foreign countries or courts because those practices indeed have no bearing on the original meaning of the U.S. Constitution. However, it is important to remember that courts are called not just to determine questions of law, but questions of fact as well. As Posner and Sunstein ask, “Suppose that the original understanding of the Constitution requires courts to answer some question of fact.”¹²⁹⁰ For example, whether “a restriction of ‘the freedom of speech’ is permissible, on the original understanding, if the government has a very strong reason for imposing the restriction; perhaps the original understanding requires an assessment of the strength of the government’s reason.”¹²⁹¹

Sometimes we have little historical evidence regarding which of multiple legal options would best fulfill the desires, meanings, and intentions inherent in the original understanding of the Constitution at the time of its adoption. When this is so, we must make a choice on the basis of information that is less than 100% complete. Waldron says that there is no inherent conflict with originalism in using foreign law to determine “how the various alternative[] [interpretations] would serve the Framers’ deeper values.”¹²⁹² The question at hand may very well be whether the restriction is reasonable, Posner and Sunstein say, in light of “the strength of the government’s reason.”¹²⁹³ They say that the question of whether the law is reasonable may be a “question of fact—whether, for example, restrictions on false commercial advertising are likely to interfere with legitimate political debate or might end up limiting market competition by reducing the ability of new entrants to bring their products to the attention of the public”—that can be answered by looking at the practices and results of other countries.¹²⁹⁴ After all, they say, “if other democratic states can tolerate such restrictions, or if other market economies can flourish despite such restrictions,” it

1289. Rosenkranz, *supra* note 135, at 1287.

1290. Posner & Sunstein, *supra* note 1055, at 1310.

1291. *Id.*

1292. WALDRON, *supra* note 75, at 92.

1293. Posner & Sunstein, *supra* note 1055, at 1310.

1294. *Id.* at 1310-11.

may be fair to say that “restricting commercial advertising provides significant benefits and imposes few costs.”¹²⁹⁵

Likewise, Posner and Sunstein say, inquiries into whether certain types of police searches are “reasonable” under the Fourth Amendment may hinge on “judgments of both fact and value.”¹²⁹⁶ Judgments of relevant foreign courts that a type of search is reasonable may merit attention if the experiences of these states can illustrate “whether such searches are likely to be intrusive or not, whether less restrictive substitutes are available, and whether the searches provide valuable information.”¹²⁹⁷ Posner and Sunstein persuade us that in cases such as these, originalism may be compatible with the citation of foreign law.¹²⁹⁸

Posner and Sunstein note that “American courts are already required to make their decisions on the basis of the facts.”¹²⁹⁹ As such, “instructing [our courts] to take these ‘foreign’ facts into account no more reduces their authority than instructing them to take account of valid scientific studies.”¹³⁰⁰ There is nothing new, Waldron notes, about conceiving of law in a scientific manner.¹³⁰¹ Gottfried Leibniz envisioned law as “a science of reasons, reasons pertaining to justice and human happiness.”¹³⁰² It involved “the application of logic and reason to first principles, and so long as the reasoning was sound, proper results would always follow. . . . [L]aw became a rational science.”¹³⁰³ Leibniz conceived of “[t]he whole of judicial procedure [as] a kind of logic applied to questions of law[s].”¹³⁰⁴ Immanuel Kant, Waldron says, also envisioned “a sort of algebra of freedom with a system of law aiming to secure the greatest possible freedom to each, over the array of complex

1295. *Id.* at 1311.

1296. *Id.*

1297. *Id.*

1298. *Id.*

1299. *Id.* at 1313.

1300. *Id.*

1301. WALDRON, *supra* note 75, at 97.

1302. *Id.* (citing Roger Berkowitz, *Democratic Legitimacy and the Scientific Foundation of Modern Law*, 8 THEORETICAL INQUIRIES L. 91, 109-10 (2007); ROGER BERKOWITZ, *THE GIFT OF SCIENCE: LEIBNIZ AND THE MODERN LEGAL TRADITION* 17-54 (2005); PATRICK RILEY, *LEIBNIZ’ UNIVERSAL JURISPRUDENCE: JUSTICE AS THE CHARITY OF THE WISE* 14-50 (1996)).

1303. *Id.* (quoting M.H. Hoefflich, *Law & Geometry: Legal Science from Leibniz to Langdell*, 30 AM. J. LEGAL HIST. 95, 102 (1986)).

1304. *Id.* (quoting DONALD R. KELLEY, *THE HUMAN MEASURE: SOCIAL THOUGHT IN THE WESTERN LEGAL TRADITION* 217 (1990) (quoting Gottfried Leibniz)).

circumstances in which humans interacted, compatible with an equal freedom for all.”¹³⁰⁵

According to Posner and Sunstein, this is not problematic:

Requiring courts to follow scientific studies rather than relying on anecdotes or local knowledge reduces their discretion in the unimportant sense that it reduces their discretion to make errors. It improves their decisions. Requiring courts to use information derived from foreign sources, where and if appropriate under the governing interpretive method, should have the same effect.¹³⁰⁶

As Waldron says, what matters is not necessarily “empirical facts or moral insights or attractive reform proposals,” but “modes of specifically legal analysis which relate the elements of a problem to the basic reasons of justice and public welfare with which the law is concerned.”¹³⁰⁷ He recognizes the concern that the *ius gentium* lets us go about “identifying the countries whose laws seem most congenial to the result we want to reach and ignoring the others,”¹³⁰⁸ but reminds us that “in other contexts, judges are accused of cherry picking domestic precedents as well.”¹³⁰⁹ To the extent we are required to rely on the fidelity of judges in rendering legal verdicts, little can be done to curb the potential for mischief without severely curtailing the powers of the judiciary altogether. Moreover, as Waldron notes, the *ius gentium* may promote “judicial restraint or . . . outcomes that are judged conservative or deferential by American standards.”¹³¹⁰ The experiences of foreign courts citing our own law do not create cause for fear that courts cite foreign law only to back up the conclusions they were already going to reach, he says;¹³¹¹ rather, foreign courts sometimes invoke American precedents whose conclusions run contrary to the outcomes that the foreign courts eventually reach anyway.¹³¹² According to Waldron, courts cite American law “as a corrective to their own liberal instincts.”¹³¹³ This should give us confidence in the abilities of judges to responsibly cite foreign legal opinion in a non-self-serving way.

1305. *Id.* (citing IMMANUEL KANT, *THE METAPHYSICS OF MORALS* 150-53, 161-99 (Mary Gregor ed. & trans., Cambridge Univ. Press 1996) (1797)).

1306. Posner & Sunstein, *supra* note 1055, at 1313.

1307. WALDRON, *supra* note 75, at 99.

1308. *Id.* at 188.

1309. *Id.* at 173.

1310. *Id.* at 145.

1311. *Id.* at 81.

1312. *Id.*

1313. *Id.*

Nonetheless, even one who can accept the general logic of the *ius gentium* may object to its citation in constitutional law cases as opposed to mere common- and statutory-law cases. The common law is promulgated by judges and is ever changing, while statutes can be, and frequently are, amended through ordinary legislative processes. Seldom is more needed to change statutes than concurrent majorities in two legislative chambers and the signature of the executive. While not always an easy process, legislative change is relatively straightforward and attainable. In contrast, the Constitution is very difficult to amend, with amendments requiring two-thirds support of each chamber of Congress and ratification by three-quarters of the state legislatures.¹³¹⁴ For this reason, it seldom changes; only twenty-seven amendments have passed in U.S. history.¹³¹⁵ The comparative inflexibility of the constitutional text perhaps cautions us against hastily interjecting foreign legal materials into it, as any unanticipated harmful consequences cannot be so easily rectified.

Moreover, as Neomi Rao points out, “[c]onstitutions are necessarily a product of various cultural and historic differences that reflect society’s most significant legal and social commitments.”¹³¹⁶ And the best way to determine what American society believes with respect to constitutional issues, Justice Scalia says, is “‘to look at the legislation that exists in states, democratically adopted by the American people.’”¹³¹⁷ Our Constitution is relatively short, containing only those rules, ideals, and structures that we have deemed essential. The entrenchment of specific governing principles in the form of a constitution can reasonably be called the quintessential expression of sovereignty by a free and independent people, and one can say that we should therefore decline to apply sources of law that originate outside the collectivity of “We the People.”

Professor Jack Balkin says that the Constitution’s text contains “rules, standards, and principles.”¹³¹⁸ “When the text provides an unambiguous, concrete and specific rule,” he says, “the principles or purposes behind the text cannot override the textual command. . . . The language creates a rule and must be applied accordingly.”¹³¹⁹ However, “where the text is ambiguous or vague, we look to the

1314. U.S. CONST. art. V.

1315. *See id.* amends. I-XXVII.

1316. Rao, *supra* note 72, at 211.

1317. Dorsen, *supra* note 137, at 534 (quoting Justice Antonin Scalia).

1318. BALKIN, *supra* note 429, at 3.

1319. *Id.* at 14.

principles and purposes behind the text to help us understand how to apply it.”¹³²⁰ This requires us to “try to determine what principles underlie the text in order to build constructions that are consistent with it.”¹³²¹ This, he says, is “one of the tasks of constitutional construction.”¹³²² Balkin suggests that “[w]e can and should use history to articulate these constitutional principles.”¹³²³ To the extent that information found in foreign law may illuminate these principles or help us understand things about our history, by way of comparison or contrast, in ways that are relevant to the question at hand, perhaps it can be relevant to the task of constitutional construction where “standards” and “principles” are involved.

For instance, an American court trying to decide whether a law that prohibits female soldiers from serving on the front lines in combat violates the Equal Protection Clause may turn to other countries to see what outcomes their respective approaches to this challenge have produced. Suppose that nations that have fully integrated their militaries with respect to gender have not seen any decreases in unit cohesion, readiness, or effectiveness.¹³²⁴ If so, the American court may glean useful information from an examination of other nations’ practices—namely, that none of the proffered justifications for the military’s exclusionary policy can withstand empirical scrutiny. If the government cannot justify its policy by demonstrating that it serves an “important governmental objective[,],” then the policy must be struck down.¹³²⁵ In this manner, we feel that reliance on foreign law can help courts settle questions involving indeterminate constitutional standards and principles by appropriately seeking relevant factual information from foreign jurisdictions that are relevant to the legal matters before them.¹³²⁶

1320. *Id.*

1321. *Id.*

1322. *Id.*

1323. *Id.*

1324. This issue was recently settled in the United States when former Secretary of Defense Leon Panetta announced in January 2013 that the Pentagon would soon lift its combat ban on women. *See* Elisabeth Bumiller & Thom Shanker, *Equality at the Front Line: Pentagon Is Set to Lift Ban on Women in Combat Roles*, N.Y. TIMES, Jan. 24, 2013, at A1, *available at* <http://www.nytimes.com/2013/01/24/us/pentagon-says-it-is-lifting-ban-on-women-in-combat.html?pagewanted=all>. However, prior to the change in policy, questions of the ethics and legality of excluding female soldiers from front-line service had been contentious subjects. *Id.*

1325. *Craig v. Boren*, 429 U.S. 190, 197 (1976). In this case, the Court laid down the “intermediate scrutiny” standard for laws that discriminate on the basis of gender. *See id.*

1326. *See* Posner & Sunstein, *supra* note 1055, at 1310-11.

CONCLUSION

Judge Guido Calabresi, in defending the propriety of citing foreign law in American courts, has said that other “countries are our ‘constitutional offspring’ and how they have dealt with problems analogous to ours can be very useful to us when we face difficult constitutional issues. Wise parents do not hesitate to learn from their children.”¹³²⁷ In this Article, we have attempted to outline a stronger justification for the *ius gentium* than that put forward by Professor Waldron, who called for a more complete theoretical justification for the citation of foreign law, and attempted to offer his own take.¹³²⁸ His *ius gentium* is “a positive law conception, not a concept of pure natural law—a brooding omnipresence on the ground.”¹³²⁹ It is, he says, “a body of principles that particular systems may draw down from when they are seeking to resolve difficult issues in a way that is wise and just and in harmony with the way those issues are resolved elsewhere in the world.”¹³³⁰

We began by listing a number of shortcomings with Waldron’s theory, and suggesting that his argument for the citation of foreign legal materials lacks sufficient theoretical legitimacy.¹³³¹ We then argued that reliance on foreign law by American courts can be legitimated to some extent by a Hayekian argument for the virtue of “spontaneous order.”¹³³² We feel that like the common law, the *ius gentium* may, to use Hayek’s language, “emerge from the efforts of judges to decide disputes” over time,¹³³³ and that it might “secure the utilization of widely dispersed knowledge” in the same way; a market-set price is “wholly the product of competition, or at least of the openness of the market to anyone who has relevant information about some source of demand or supply for the good in question.”¹³³⁴

Next, we discussed the concepts of “private knowledge” and “crowd wisdom” and their application to the *ius gentium* as further theoretical justifications for it.¹³³⁵ Surowiecki argues large groups

1327. *United States v. Then*, 56 F.3d 464, 469 (2d Cir. 1995) (Calabresi, J., concurring).

1328. WALDRON, *supra* note 75, at 22-23.

1329. *Id.* at 43.

1330. *Id.* at 51.

1331. *See supra* Part I.

1332. *See supra* Section II.B, Part III; HAYEK, RULES AND ORDER, *supra* note 111, at 95.

1333. HAYEK, RULES AND ORDER, *supra* note 111, at 94.

1334. HAYEK, MIRAGE, *supra* note 111, at 117.

1335. *See supra* Part IV.

yield wise collective decisions when four conditions are met, each of which may be argued to be present in the *ius gentium*—they are “diversity of opinion,” “decentralization,” “independence,” and an “aggregation” mechanism for producing collective judgments out of individual choices.¹³³⁶ We suggested that the *ius gentium* is in fact, or else may be, characterized by these conditions.¹³³⁷ Finally, we examined and responded to criticisms that may still be leveled at the *ius gentium*.¹³³⁸

We make no claim to the perfection of the ideas we introduce in this Article; further improvements may still be offered. Strong arguments can be made against the *ius gentium* that we are not prepared to dismiss entirely; we are particularly concerned about the implications that citation of foreign law by American courts will have for American sovereignty. Nonetheless, we feel that there are certainly strong arguments to be made in its favor as well—stronger, at least, than those offered by Professor Waldron. We endorse citing foreign law only in the same way judges currently cite books and law review articles—for their persuasive value—and not as binding sources of authority. With that critical caveat, we do think the citation of foreign law can on occasion be valuable.

In *Roper v. Simmons*, Justice Kennedy wrote that “[i]t does not lessen our fidelity to the Constitution or our pride in its origins to acknowledge that the express affirmation of certain fundamental rights by other nations and peoples simply underscores the centrality of those same rights within our own heritage of freedom.”¹³³⁹ We agree. Where the citation of foreign law by domestic courts is concerned, we caution that care must always be taken and rules followed to ensure that all sides of a controversial opinion are taken into account; that subjectivity and arbitrariness is minimized; that such work does not become a mere veneer for unchecked judicial activism; and that proper respect is paid to the principle of American political and legal sovereignty. When these conditions are met, we believe that the *ius gentium* can be a powerful and helpful tool for American courts struggling with how best to understand and respond to the vagaries and indeterminacies that arise in the law. It is a guide for how the United States may best conceptualize itself as, to quote Anne-Marie Slaughter, a “participant[] in a common judicial

1336. SUROWIECKI, *supra* note 115, at 10.

1337. *See supra* Section IV.C.

1338. *See supra* Parts V-VI.

1339. 543 U.S. 551, 578 (2005).

enterprise” as a member of “a community with identifiable organizing principles,” engaging in “a profession that transcends national borders.”¹³⁴⁰ At its best, we believe the *ius gentium* offers something of a loose roadmap for judges grappling with difficult but universal legal questions of how past jurists have navigated similar waters. Again, we endorse the citation of foreign law for its informational component, as with citation of a book or law review article, but not as a legally binding authority.

1340. ANNE-MARIE SLAUGHTER, A NEW WORLD ORDER 68 (2004).

